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IMPROVING ADMINISTRATIVE JUSTICE IN MANITOBA:

STARTING WITH THE APPOINTMENTS PROCESS

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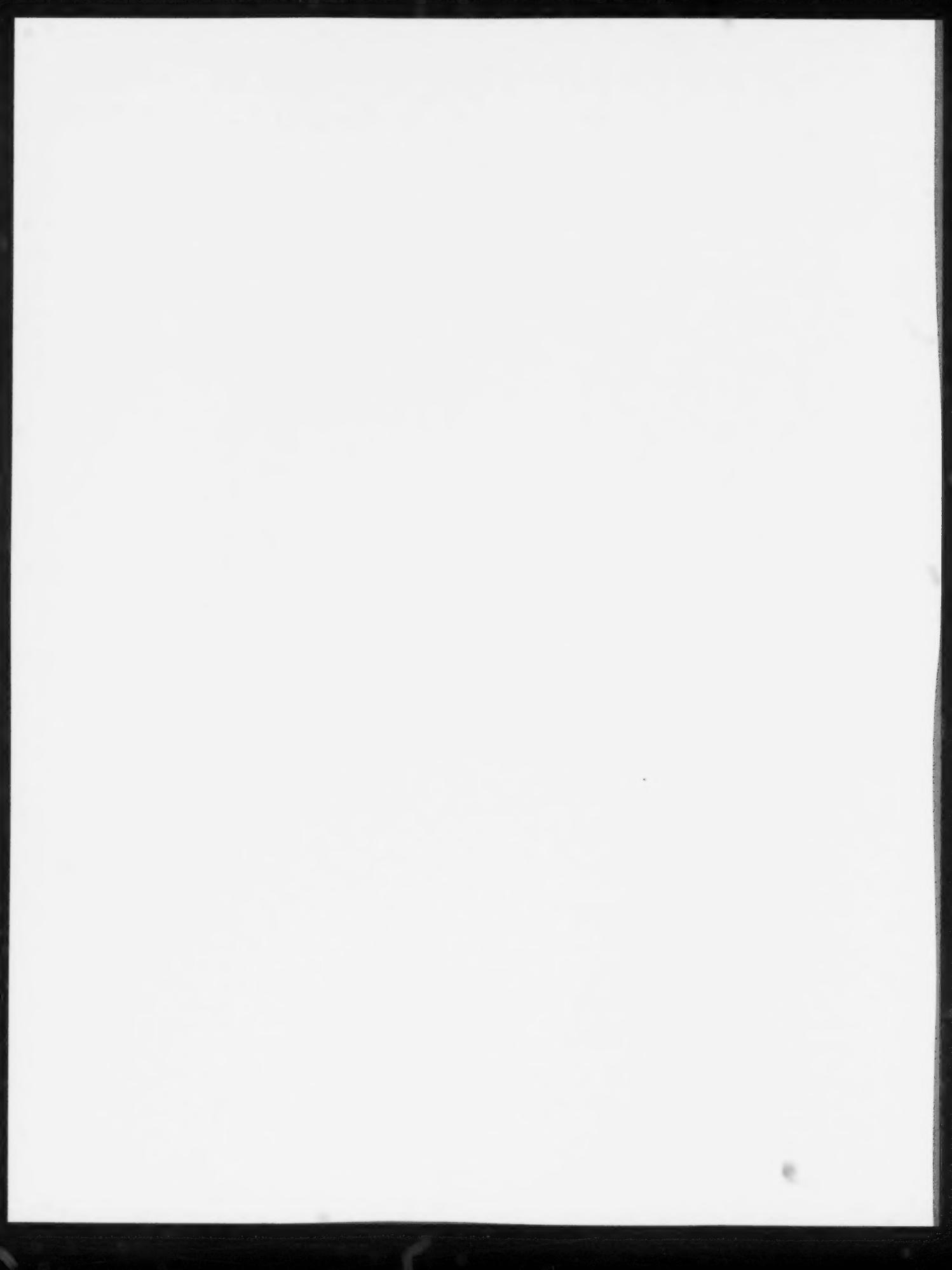


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CHAPTER 1

INTRODUCTION

A. OVERVIEW

On the last day of the first session of the Manitoba Legislature in 1871, enabling legislation creating seven administrative boards or statutory delegates was passed.¹ Maintenance of public order, health and safety was high on the list of legislative priorities with the establishment of the Bar Society, the Medical Board and the granting of disciplinary powers to the Chief of Police. Physical and social infrastructure planning and economic regulation were the other priorities. The Highway Commission was formed to make recommendations on where highways should go, the Board of Education was established, the Lieutenant-Governor in Council was given the authority to appoint licensors charged with granting licenses to carry on business (including liquor and gambling business licenses), and a regime was put in place to regulate ferry tolls.

Manitoba now has about 160 administrative agencies, boards and commissions (often referred to as “ABCs”) that operate outside the line departments of government. About 1500 people have been appointed by the government to these boards as full or part time decision makers. The government relies on administrative boards to regulate and adjudicate, to give advice, to administer substantial financial and other assets, including Crown corporations and to provide goods and services. Some of the decisions now being made by administrative boards were formerly made by courts, others would have been made by departmental staff or by politicians and some by private actors, such as hospital boards. Other administrative boards are appointed to take on roles that emerge as governments assume regulatory functions.

ABC decisions have a profound impact on our daily lives and include diverse decisions such as those related to human rights, residential tenancies, public utilities, worker compensation, agency review of mental competency or ability to drive a vehicle, liquor licensing, environmental protection and land use and compensation. By one estimate, in excess of one million rights-related decisions are made in Ontario each year by administrative boards.² A recent study in Alberta described how that government had been transformed in the previous twenty years by a proliferation of administrative boards making regulatory, corporate and service

¹ Statutes of Manitoba, 1871-1874 (34-38 Vict.) Chapters X, XI, XII, XIII, XX, XXVI, XXXI.

² Administrative Justice Working Group (AJWG), Submission to the Ontario Law Reform Commission on Research Priorities (March 2007), online: <[www.lawib.utoronto.ca/.../Administrative_Justice.../Law_Commission_%20AJWG_Submission_%20final_form_%20March_15_%202007...>](http://www.lawib.utoronto.ca/.../Administrative_Justice.../Law_Commission_%20AJWG_Submission_%20final_form_%20March_15_%202007...)

In this submission, the Administrative Justice Working Group (AJWG) is self-described as an “*ad hoc* assemblage of Ontario administrative justice professionals who have come together in an effort to ... optimiz[e] the fairness, independence, impartiality, competence and efficiency of the administrative justice system and its tribunals through non-partisan advocacy on behalf of that system.” The AJWG has been meeting since 2003.

delivery decisions. "About 50 percent of the Government of Alberta's annual operating expenditures are now administered through the province's agencies, boards and commissions."³

Why have these responsibilities been diverted to administrative boards? One suggestion is because they "offer the prospect of an access-point to the state which projects an image of credibility precisely because the executive cannot directly interfere with how they allocate regulatory goods".⁴ Administrative boards are used instead of courts, departmental staff or politicians to make decisions not only because they can make some decisions more efficiently and more openly by tailoring their processes to the decision at hand but, more importantly, because they are experts in the subject matter of the decisions with which they have been charged. Expertise is repeatedly stated by courts, politicians, lawyers and academics to be the *raison d'être* of administrative boards.⁵ Yet, the legislation setting up most administrative boards does not, in fact, set out specific qualifications for many positions nor does it mandate that a competency or merit-based approach be taken to appointments. A 2009 research study prepared in support of this report determined that there are almost 250 Order in Council appointments mandated by statute in Manitoba.⁶ Most of the provisions (164/250) governing these sections contain no direction whatsoever on the qualifications required for the position, stating simply that "the minister may appoint". Almost all of the rest contain minimal qualifications such as a professional designation, "representative of the interests of the general public" or "interest in the problem of addiction".⁷

In spite of the need for public confidence in the independence and impartiality of administrative decision makers and the desirability of having certain decisions made by expert decision makers rather than generalist judges or politicians, governments across Canada have a

³ Neil McCrank, Linda Hohol, Allan Tupper, "At the Crossroads: The Report of the Board Governance Review Task Force" (1 October 2007), online: <http://www.alberta.ca/home/documents/At_a_Crossroads_-_screen.pdf> at 11.

⁴ David Pond, "Rewriting the Rules of the Game: The Common Sense Revolution and Administrative Justice" (2004), online: <<http://www.cpsa-acsp.ca/papers-2004/Pond.pdf>> at 14.

⁵ *Canada v. Southam Inc.*, [1997] 1 S.C.R. 748 at paras 50-53; *International Longshoremen v. Prince Rupert Grain Ltd.*, [1996] 2 S.C.R. 432 at paras 22-26; Report of the Agency Reform Commission on Ontario's Regulatory and Adjudicative Agencies, *Everyday Justice*, (Toronto: Queen's Printer for Ontario, 1998) (Chair: Garry Guzzo) [Guzzo Report]; Final Report of the Agency Cluster Facilitator for the Municipal, Environmental and Land Use Planning Tribunals (Toronto: Queen's Printer for Ontario, 2007); Ombudsman Saskatchewan, "Hearing Back: Piecing Together Timeliness in Saskatchewan's Administrative Tribunals", (December 2007), online: <<http://www.ombudsman.sk.ca/other-reports.html>>; Laverne Jacobs and Thomas Kuttner, "The Expert Tribunal" in Laverne Jacobs and Anne L. Mactavish (eds), *Dialogue Between Courts and Tribunals—Essays in Administrative Law and Justice* (2001-2007) (Montreal: Les Editions Themis, 2008) at 67-92.

⁶ A research study was prepared by Matthew Underwood, a student at the Faculty of Law, University of Manitoba, and included appointments to offices such as inspectors and auditors and ad hoc appointments such as labour conciliators. Therefore, the figure on the number of administrative appointments is higher than the figure noted on the previous page.

⁷ *Ibid.*

long history of using board appointments as a means of rewarding political loyalties and ensuring that kindred individuals are in positions of authority.⁸

More than 30 significant studies have identified problems with board appointments processes in Canada since 1979 starting with the Royal Commission on Financial Management and Accountability⁹ and, most recently, reports by the Board Governance Review Task Force¹⁰ in Alberta and the Saskatchewan Ombudsman,¹¹ both in 2007. All of these reports and their recommendations on the board appointments processes are influenced by the following concerns:

First, there is an overall need to improve public trust and confidence in the integrity of the political process and ABCs themselves, in the face of a widespread perception that patronage is the deciding factor in appointments. *Second*, there is a need to ensure the competence of arm's length governance boards that have significant regulatory, adjudicative and service responsibilities. *Third*, there is a need to ensure quality governance for these ABCs to avoid putting the public purse at risk.¹²

⁸ Lorne Sossin, "The Uneasy Relationship between Independence and Appointments in Canadian Administrative Law" in Grant Huscroft and Michael Taggart (eds), *Inside Outside Canadian Administrative Law: Essays in Honour of David Mullan* (Toronto: University of Toronto, 2006) at 50. See also: David Pond, "Legislative Oversight of Political Patronage in Canada" (2008) 46 Commonwealth and Comparative Politics 365; David Pond, "Legislative Control of Cabinet Appointments to the Public Service: A Canadian Case-Study in the Political Limits of Parliamentary Reform" (2008) 61 Parliamentary Affairs 52 and David Pond, *supra* note 4; Nancy Averill, Nicole Murphy & Susan Snider, "Governor in Council Appointments: Best Practices and Recommendations for Reform" (February 2004), Public Policy Forum, online: <http://www.pppforum.ca/sites/default/files/gov_apt_reform.pdf>; Peter Aucoin and Elisabeth Goodyear-Grant, "Designing a Merit Based Process for Appointing Boards of ABCs: Lessons from the Nova Scotia Reform Experience" (2002) 45 Canadian Public Administration 301-327; Angela Weltz and Wendi J. Mackay, "Appointments: A Policy Framework for Administrative Tribunals: A Background Paper", Administrative Justice Project, (Ministry of the Attorney-General, Victoria, British Columbia, 2002), online: <<http://www.gov.bc.ca/ajo>>; "Making Sound Appointments: A Report prepared for the Attorney General" Administrative Justice Project, (July 2002), online: <<http://www.gov.bc.ca/ajo>>; Ed Ratushny, "The Independence of Federal Administrative Tribunals and Agencies in Canada" (Ottawa: Canadian Bar Association, 1990); Law Reform Commission of Nova Scotia, *Discussion Report: Agencies, Boards and Commissions, The Administrative Justice System in Nova Scotia* (February 1996) and Law Reform Commission of Nova Scotia, *Final Report: Reform of the Administrative Justice System in Nova Scotia* (January 1997); Jeffrey Simpson, *Spoils of Power: The Politics of Patronage* (Toronto: HarperCollins 1988); Rosalie Silverman Abella, "Canadian Administrative Tribunals: Towards Judicialization or Dejudicialization?" (1988) 2 Canadian Journal of Administrative Law and Practice; and Canada, House of Commons, Special Committee on the Reform of the House of Commons, *Third Report* (Ottawa: Queen's Printer, June 1985) (Chair: James A. McGrath) [McGrath Report].

⁹ Canada, Royal Commission on Financial Management and Accountability, *Final Report*, (Hull: Canadian Government Publishing Centre, 1979) [commonly called the "Lambert Report"].

¹⁰ McCrank *et al*, *supra* note 3.

¹¹ Ombudsman Saskatchewan, *supra* note 5.

¹² [New Brunswick] Commission on Legislative Democracy, *Final Report and Recommendations*, (December 2004) at 84, online: <<http://www.gnb.ca/0100/FinalReport-e.pdf>>.

People across Canada have come to “regard patronage-based appointments to public offices to be unsavoury, antiquated and incompatible with the requirements of good democratic governance and of good public administration.”¹³ In addition to growing public distaste for patronage appointments, administrative justice regimes also face a number of challenges resulting from the changing and increasingly complex nature of what they do, but “unless appointments issues are addressed in a complete and comprehensive way, success in realizing other reforms within the administrative justice system is likely to be elusive, difficult and short-lived.”¹⁴ For administrative boards to be effective, governments must “consistently use an appointment process that focuses on matching the competencies of appointees with the skills needed by the agencies.”¹⁵ Thus, the first step towards ensuring quality performance of administrative boards in Manitoba is to examine the quality of the appointments process.

Canadian courts have shown a real reluctance to engage in review of administrative board appointments on the ground that appointees, by virtue of their political connections, might be reasonably apprehended to be biased or that the processes used and implicit expectations of the appointers and the appointees leads to a lack of institutional independence. Some cases have succeeded in a challenge based on an appointee’s failure to meet the minimum statutory requirements for appointment but, given that most statutes set out very minimal qualifications, such challenges are not likely to succeed very often. It has been observed that “... constitutionally entrenched protection of judicial independence is understood not to extend to the sphere of administrative tribunals, ordinarily viewed as instruments of governmental policy. [However,] [t]he deference of Canadian courts to tribunals without constitutional protection for independence means that many tribunal decisions remain insulated from review by independent courts”, and that courts are not likely to abandon the rigid judicial model of independence focused on post-appointment criteria such as security of tenure.¹⁶ Further, it has been observed after a review of case law on judicial review of appointments that “the real action on reform of the appointments process towards a merit-based system will continue to take place in the legislative and executive spheres and at the agency level.”¹⁷

¹³ Aucoin and Goodyear-Grant *supra* note 8 at 204.

¹⁴ Weltz and Mackay *supra* note 8 at 84.

¹⁵ McCrank *et al.* *supra* note 3 at 45.

¹⁶ Gerald Heckman and Lorne Sossin, “How Do Canadian Administrative Law Protections Measure Up to International Human Rights Standards? The Case of Independence” (2005) 50 McGill L.J. 193-264, see abstract.

¹⁷ Gerald Heckman, “Judicial Review of Agency Appointment—The Legal Landscape.” Paper presented at the Manitoba Council of Administrative Tribunals 3rd Annual Conference, Winnipeg, April 2008 (cited with the author’s permission.). See also: Katrina Wyman, “Appointments to Adjudicative Tribunals: Politics and Courts” (1999) 57 U of T Fac. L Rev. 101.

In the last decade most Canadian provinces and the federal government have reviewed their board appointments processes and most have implemented changes to ensure that their processes are more open, transparent, accountable, less partisan and more merit-based. The New Brunswick government, for example, stated that:

... the creation of an economic environment that truly welcomes entrepreneurship and innovation requires building upon a solid foundation of public sector institutions that are open and trustworthy. People need to have faith that the government and its agencies are accountable and trustworthy before they can be expected to dedicate significant long term investments of time, commitment and capital.... It is crucial therefore that the appointments process be as fair and objective as possible. That is why the government will institute an appointment process guided by the following principles: transparency, openness, diversity and merit.¹⁸

Reforms in some jurisdictions affect all appointments to government boards from rights-determining adjudicative tribunals to Crown corporations' boards of directors while others are more limited in their application. The only Canadian jurisdictions not to have made some changes to their appointments process are Saskatchewan, Newfoundland and Labrador, Nunavut and Manitoba. The Northwest Territories is currently engaging in a significant board restructuring and governance review (which will include the appointments process) but this process is not yet complete.

B. SCOPE OF REPORT

This report discusses the difficult issue of what role, if any, partisanship should play in the appointments process. The report will outline the formal mechanisms for making board appointments in Canadian common law jurisdictions¹⁹ and outline the issues that arise with the less formal mechanisms. It will examine how concerns with appointments have emerged in Canadian jurisdictions and how governments have changed their appointments processes in response to the concerns raised and will describe publicly available information on the current appointments process in Manitoba. This discussion will start with Nova Scotia, which in 2002, was the first jurisdiction to develop a comprehensive appointments policy and will describe what other jurisdictions have done, in the order of when each jurisdiction made significant changes to its appointments process. Following a review of the unreformed jurisdictions, the extraordinarily comprehensive reforms in the United Kingdom will be described. The final part of this report will examine more closely the elements of appointments policies and make recommendations on a new appointments policy for Manitoba.

¹⁸ Government of New Brunswick, *An Appointment Policy for New Brunswick Agencies, Boards and Commissions, Changing the Way Appointments Are Made*, (undated) online: <<http://www.gnb.ca/0012/abc/index-e.asp> at 4>.

¹⁹ The administrative justice regime in Quebec is much more judicialized than the regimes in the rest of the country and therefore it is not described in this report.

C. TERMINOLOGY

In this report the term 'partisanship' is used in the sense of appointees' known sympathies with the government's political leanings; the term 'patronage' is used to connote a reward given to a minimally qualified candidate for service to a political party; the 'merit principle' is used to describe appointments that are non-partisan (that is, not influenced by political affiliation or patronage) and based on candidates demonstrating that they meet specific, objective qualifications; and the 'best candidate' refers to the appointment of the most qualified of all candidates, as distinct from merely a qualified applicant.

D. ACKNOWLEDGEMENTS

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The Commission appreciates the advice and feedback that Professor Busby received while writing this report from Paul Thomas, Lorne Sossin, Alan Scramstad, Terry Sargeant, Ross Nugent, Mel Myers, Jan Lederman, Archie Kaiser, Gerald Heckman, Cameron Harvey, Michelle Gallant, Aaron Berg and Chris Axworthy. Additionally, the Commission acknowledges the research assistance provided to Professor Busby by Matthew Underwood, a law student at the University of Manitoba, with the support of a grant from the Legal Research Institute at the Faculty of Law, University of Manitoba.

The recommendations in this report are those of the Commission and do not necessarily reflect the views of those who provided their advice and feedback.

CHAPTER 2

PARTISANSHIP AND THE APPOINTMENTS PROCESS

A. GENERAL

Many administrative boards are expected to operate independently from the government. “[F]rom the government’s point of view, there is much to be said for diverting responsibility for the resolution of politically sensitive areas to specialized (discrete) non-partisan government bodies.”¹ Some agencies are established to separate from political interference decisions that should be based on sound professional or technical knowledge. Administrative boards are often established to ensure that the very high technical requirements of policy making in the regulated areas can be determined in an atmosphere that enjoys “expertise, flexibility, adaptability and freedom from partisanship.”²

However, partisanship, in the sense of known sympathies with the government’s political philosophy, will always play a role in board appointments processes. It would be naive to assert otherwise and, moreover, many would argue that partisanship has a legitimate, perhaps significant, role to play for at least some board appointments. Some administrative boards are appointed to give expert advice to the government with an important aspect of their expertise being that the political philosophies of appointees are in line with those of the government. For example, the relationship between ministers and the boards of Crown corporations has been described as one that relies on private informal communication with corporate officials that allows governments to minimize the opportunities for opposition challenges.³ Ministers and government officials (including political staff) signal the government’s intent and objectives to the corporation through several channels or the board and management anticipate what they want. Some commentators have observed that:

At the heart of the relationship between the minister and the corporate officials is an implicit bargain. From the corporation, the minister expects no surprises that might be politically embarrassing. In return boards and management expect ministers to respect their freedom to manage the corporation on a daily basis, while recognizing the need for continuing ministerial support.⁴

¹ Law Reform Commission of Nova Scotia, *Final Report: Reform of the Administrative Justice System in Nova Scotia* (January 1997) [Law Reform Commission of Nova Scotia Final Report].

² Paul G. Thomas and Orest W. Zajcew, “Structural Heretics: Crown Corporations and Regulatory Agencies” in Michael Atkinson (ed), *Governing Canada: Institutions and Public Policy* (Toronto: Harcourt Brace Jovanovich, 1993) at 120.

³ *Ibid.*

⁴ *Ibid.*

It is significant to note that *The [Manitoba] Human Rights Code* prohibits differential treatment based on “political belief, political association or political activity” in “any aspect of employment or occupation” [expansively defined] unless the discrimination is “based upon bona fide and reasonable requirements.”⁵ Such requirements must be explicitly stated before they can satisfy the bona fide requirements exception. In *Condon v. Prince Edward Island*,⁶ the court found that:

[T]he prohibition against political belief discrimination under the HRA was aimed specifically at addressing the notorious problem of patronage that so often had resulted in the mass replacement of unprotected workers and service contractors in the public service of this province following a change of government. The practice took place under both Liberal and Progressive Conservative governments. Those dismissed or not rehired or not re-engaged following a change were supporters of the former governing party, or at least were perceived as such, while their replacements were supporters, or perceived as such, of the new governing party.

A difficult issue therefore in any consideration of appointments policies is what continuing role partisanship should have in the appointments process. In contrast, patronage, as distinct from partisanship is not compatible with the objectives of any modern appointments policy and has no role to play. What then is the right relationship between considerations of merit and partisanship?

Most Canadian jurisdictions that have adopted general appointments policies in recent years state that the purpose of the policy is to ensure that the best candidate is appointed and that the overriding principle of selection is merit. The Alberta appointments policy states that the appointments process for all administrative boards will be “non-partisan.” No other Canadian policy expressly refers to partisanship either to assert its limitations or to justify its continued use in the appointments process. As will be described later in this report, some other jurisdictions have not adopted appointments policies that significantly reduce the potential for partisan considerations to enter the appointments process and some do not even pay close attention to merit. For example, some policies require that the screening process screen through to the appointing authority, regardless of the kind of administrative board, all qualified candidates (not a ranked short list). If the job description only lists the minimum statutory criteria for appointment (which, as noted already, are non-existent or minimal for most boards), then a list of all qualified candidates will include every applicant, allowing for partisanship to play a significant role.

The justifications offered for the continued use of partisan considerations in making appointments to administrative board positions include that the minister is accountable for the performance of the board and therefore must be able to appoint those whom he or she knows to

⁵ *The Human Rights Code C.C.S.M. c. H175 ss 9(2)(k) and 14.*

⁶ 2006 PESCAD 1, at para. 3, 253 Nfld. & P.E.I.R. 265.

be reliable. The appointments policy recently adopted in New Brunswick is somewhat more explicit in its support for partisan considerations and states that one objective is “ensuring that all individuals who are appointed ...will be able to provide the most effective contribution to the strategic objectives outlined by the government.”⁷ These justifications can be challenged in a number of ways, including: that administrative boards are appointed to make independent decisions; more effective accountability mechanisms exist than implicit expectations; and “effective contribution to the strategic objectives” is better served through more formal mechanisms than through unstated expectations of those appointed to boards.

A report prepared for the Canadian Bar Association stated that:

One basic premise of this report is that Canadians should be told by Parliament whether or not a tribunal or agency is independent of government and they should be entitled to rely on what they have been told. Anything less will diminish the integrity of administrative decision making. What is clearly undesirable is for a Government to pay lip service to the independence of a tribunal and then proceed to undermine that perceived independence in a variety of ways.⁸

Others have echoed similar sentiments and observed that:

... if agencies exist to serve the ends of government policy, then the trappings of independence surrounding the typical agency or tribunal constitute an “elaborate hoax” enabling a minister to effectively influence a tribunal’s decisions without having to accept responsibility for them.⁹

As the decisions that most Manitoba administrative boards make are not constrained by the constitutional imperatives requiring independence,¹⁰ the government has a free rein to determine the direction that any administrative board will take. It exercises that control using legislation or a reserved power to make regulations to restrict the board’s powers, jurisdiction,

⁷ Government of New Brunswick, *An Appointment Policy for New Brunswick Agencies, Boards and Commissions, Changing the Way Appointments Are Made*, (undated), online: <<http://www.gnb.ca/0012/abc/index-e.asp>>.

⁸ Ed Ratushny, “The Independence of Federal Administrative Tribunals and Agencies in Canada” (Ottawa, Canadian Bar Association, 1990) at 10.

⁹ David Pond, “Rewriting the Rules of the Game: The Common Sense Revolution and Administrative Justice” (2004), online:<<http://www.cpsa-acsp.ca/papers-2004/Pond.pdf>> at 4, citing Paul G. Thomas and Orest W. Zajcew, “Structural Heretics: Crown Corporations and Regulatory Agencies” in Michael Atkinson (ed), *Governing Canada: Institutions and Public Policy* (Toronto: Harcourt Brace Jovanovich, 1993).

¹⁰ The *Canadian Charter of Rights and Freedoms* Part 1 of the *Constitution Act*, 1982, being Schedule B to the *Canada Act*, 1982 (U.K.) 1982 c.11 probably only requires independence guarantees when a board is making decisions affecting “life, liberty and security of the person”. The *Quebec Charter of Human Rights and Freedoms*, R.S.Q., c C-12 requires that all quasi-judicial decisions be made by an “independent and impartial agency” and the federal *Bill of Rights* R.S.C. 1985, Appendix III guarantees a “fair hearing” whenever “rights and obligations” may be affected.

mandate or discretion, to mandate that general or specific policy directives be followed, or to require ministerial or departmental consultation during the boards' decision making process or post-decision review. For example, the *Planning Act*¹¹ expressly provides that the various land use planning bodies established under that Act must follow provincial land use policies established from time to time by regulation. Such regulations could significantly constrain the choices available to planning boards. The legislation also provides for pre-decision consultation and post-decision review by the minister. Thus the legislation makes it clear that the minister retains significant control over all land use decisions when he or she chooses to exercise this control but must, at least, receive the advice of the planning board.¹²

Ultimately, if appointments are made primarily based on partisan affiliation with little regard to merit, the boards will lack the expertise to provide sound advice. Further, if the minister attempts to exercise too much control over such boards, there is a risk that the boards will lose their credibility.¹³ Given governments' ability to place significant, effective, clear and public controls over the policy direction and accountability of administrative boards, it compromises the integrity of the system to have administrative boards who are expected, informally, to do the government's bidding.

B. CATEGORIES OF ADMINISTRATIVE BOARDS

1. Nature of a Board's Function

The nature of the function performed by a board makes a difference in some appointments policies regarding the permissible influence of partisan considerations; policies across Canada differ significantly on their basic approach to this issue. Some jurisdictions seem to justify the use of partisanship depending on the primary function of the board and the reason

¹¹ C.C.S.M. c. P80.

¹² It has been suggested that directions such as those imposed upon planning boards in Manitoba, limit the potential for administrative tribunals to make good decisions. See France Houle and Lorne Sossin, "Tribunals and Guidelines: Exploring the Relationships between Fairness and Legitimacy in Administrative Decision-Making" (2006) 46 Canadian Public Administration 283-307. However, the open use of such control mechanisms is lawful when authorized by enabling legislation and the interested public can assess who is really making the final decision. For example, planning boards in Manitoba can not be used as smokescreens to deflect attention away from the minister if these boards were to become hamstrung by provincial policies or if their recommendations are not followed.

¹³ For an cautionary tale on what happened in Ontario when the government tried to exploit the status of the Ontario Municipal Board (OMB) as an independent decision-maker in order to deflect accountability of its restructuring of the province's land use system by counting on its appointees to do its bidding. The casualty was the OMB's status as an arm's length tribunal. See David Pond, "Rewriting the Rules of the Game: The Common Sense Revolution and Administrative Justice" (2004), online: <<http://www.cpsa-acsp.ca/papers-2004/Pond.pdf>>.

why it was established whereas independence and expertise will be more important considerations than partisanship for other boards.¹⁴ The policy in Alberta holds to the merit principle regardless of the nature of the administrative tribunal; the board chair is required to be an integral part of all appointments processes and the screening committee only screens through to the appointing authority the “top candidates” regardless of the type of board. The Nova Scotia appointments policy distinguishes between adjudicative and non-adjudicative boards,¹⁵ leaving more scope for partisan influence to enter the decision making process for non-adjudicative appointments. On the government of Nova Scotia website is the statement that merit is the criterion for adjudicative appointments, but this requirement is omitted when describing non-adjudicative appointments. This policy implicitly accepts that the government should be able to appoint to regulatory, advisory, service and corporate boards, those whose political judgment they trust to promote and advance the government’s policy objectives. The New Brunswick appointments policy also seems to imply that partisanship could be a consideration for all appointments when it states that:

Even the most independent ABC plays an instrumental role in helping to carry out the broader public policy objectives of the elected government. For that reason, the central government must take active steps to ensure that the leadership of its agencies, boards and commissions understands the part they are expected to play in supporting the government’s broader agenda.¹⁶

Manitoba’s administrative boards perform myriad functions and it is useful to consider the range of these functions in this discussion of partisanship. The Alberta Board Governance Framework¹⁷ uses a typology to describe different categories of boards that is both simple but also complex enough to capture the nuance needed for this discussion. It classifies boards by whether their primary function is adjudicative/regulatory (which this report treats as two distinct categories), public trust, corporate enterprise, service delivery or advisory. The Commission will use the Alberta Board Governance Framework to discuss the following types of boards:

¹⁴ For example, as will be discussed, there is a real need for an independent board when a government program or official has a stake in the outcome of proceedings, as in the case of an adjudicative board. The arm’s length nature of the relationship also can be effective in diffusing political influence over regulatory or advisory decisions that should be based on sound professional or technical principles. See Angela Weltz and Wendi J. Mackay, “Appointments: A Policy Framework for Administrative Tribunals: A Background Paper” Administrative Justice Project, (Ministry of the Attorney-General, Victoria, British Columbia, 2002), online: <<http://www.gov.bc.ca/ajo>>.

¹⁵ The Nova Scotia list of non-adjudicative boards includes, the Offshore Petroleum Board, the Board of Police Commissioners, Workers’ Compensation Board, and Film Classifiers under the Alcohol and Gaming Authority.

¹⁶ Government of New Brunswick, *supra* note 7 at 2.

¹⁷ Government of Alberta, *Public Agencies Governance Framework*, (February 2008), online: <http://www.alberta.ca/home/documents/Governance_Framework_web_version.pdf>. A more detailed analysis of this framework will be discussed further in this report in connection with the reforms that have taken place in Alberta.

(a) Adjudicative Tribunals

Adjudicative tribunals can be described as quasi-judicial because they make decisions involving rights-related disputes that affect specific individuals. Usually the dispute is adversarial, focuses on determining “what happened?”, applies established legal principles and directly affects only a few parties. Examples of adjudicative tribunals would include the Residential Tenancies Commission, human rights adjudicators, labour and employment boards, the Land Value Appraisal Commission, the Automobile Injury Compensation Appeal Commission, and the Social Services Appeals Board. Boards charged with issuing competency-based licenses (such as professional or trade-related licenses) could also be described as adjudicative. The nature of the rights at stake is significant to individual litigants and the government is often a party or has a stake in the outcome of the proceedings and therefore the need for independence is important. Thus it should be expected that merit alone and a “best qualified candidate” standard would be the criteria for appointment to such boards to ensure their expertise, independence and impartiality.

(b) Regulatory Boards

Regulatory boards are those charged with regulating complex or technical sectors and their decisions, while made in a somewhat adversarial process, affect many. The factual focus is less on “what happened?” and more on “what would happen if?” For example, they may issue licenses intended to control competition (Taxicab Board) or regulate the rates charged for mandatory public car insurance and by public utilities (Public Utilities Board). Their legislative mandates are often succinctly stated (such as “public necessity and convenience” or “just and reasonable rates”) but these boards engage in a policy making function on a case by case basis through their reliance on and creation of precedent and their expert knowledge of changing technical, social and economic conditions. Regulatory boards are established usually for two reasons: (1) to insulate difficult decisions, like annual insurance rate hikes, from the hurly-burly of politics and (2) to ensure that the decisions are made by expert decision makers capable of taking a long-term view of the implications of their decisions. Political philosophy regarding economic or social values may have an impact on members’ views on issues such as the desirability of competition or the promotion of protection for socially disadvantaged groups. Therefore, it can be expected that partisanship will play a role in appointments to some regulatory boards but this expectation must not overshadow the need to ensure that only those with the requisite technical expertise and capacity for independence necessary to do the job are appointed.

(c) Public Trust Agencies

Public trust agencies are those charged with administering financial or other assets. These would include pension fund regulators, the Investment Pool Authority, the Manitoba Arts Council, and the Manitoba Museum Board. One would expect that public trust agencies would

have appointments policies that are less arms length from the government than those boards with regulatory or adjudicative functions and that some partisanship considerations may exist. That said, where this work is highly specialized, one would expect that merit would be a significant criterion for appointment.

(d) Corporate Enterprises

Corporate enterprises are those that provide or sell goods or services in a commercial manner. Examples would include Manitoba Hydro, Manitoba Public Insurance Corporation and the Manitoba Liquor Control Commission. Auditors General from across the country and others¹⁸ have asserted that competency and relevant experience must be the overriding criteria for corporate boards of directors. However, given the nature of the relationship between the boards of such enterprises and the government,¹⁹ partisan considerations may also play some role in these appointments.

(e) Service Delivery Agencies

Service delivery agencies are bodies that provide or direct government services. Notable examples are regional health authorities and child and family services agencies. Given that these agencies are responsible for very significant spending and the oversight of complex organizations, one would expect that appointees would have a composite skill matrix of economic, financial, health care and social service delivery and consumer expertise.²⁰ Partisan considerations may be important insofar as these agencies create and implement policy but merit should be the overriding consideration if these agencies are to perform their functions properly.

¹⁸ See for example, Report of the Office of the Auditor General of Canada to the House of Commons, *Governance of Small Federal Entities*, (December 2008); Report of the Office of the Auditor General of Canada, *Governor in Council Appointments Process*, Chapter 2 in the *Status Report of the Auditor General of Canada to the House of Commons* (2009), online: <http://www.oag-bvg.gc.ca/internet/English/parl_oag_200903_02_e_32289.html>; Auditor General Alberta, *Report on the Recruiting, Evaluating and Training Processes for Boards of Directors in the Alberta Public Sector*, (August 2005), online: <http://www.oag.ab.ca/files/oag/Recruiting_rpt.pdf>; Report of the Manitoba Regional Health Authority External Review Committee (February 2008), online: <<http://www.gov.mb.ca/health/rha/review.html>>; Neil McCrank, Linda Hohol & Allan Tupper, "At the Crossroads: The Report of the Board Governance Review Task Force" (October 1, 2007), online: <http://www.alberta.ca/home/documents/At_a_Crossroads_-_screen.pdf at 2>; [New Brunswick] Commission on Legislative Democracy, *Final Report and Recommendations*, (December 2004) at 84, online: <<http://www.gnb.ca/0100/FinalReport-e.pdf>>; Price Waterhouse Coopers, "Corporate Governance and Accountability in Manitoba Crown Corporations" (February 2002); and Peter Larson and Bill Neville, "Protecting the Shareholder: A Review of Governance Structure of Canadian Crown Corporations" Public Policy Forum (Ottawa, September 1998).

¹⁹ See Thomas and Zajcew, *supra* note 2.

²⁰ See report of the Manitoba Regional Health Authority External Review Committee, *supra* note 18, for a consideration of appointments to regional health boards in Manitoba.

(f) Advisory Councils

Advisory councils are those charged with providing advice to the government and would include bodies like the Manitoba Ethnocultural Advisory and Advocacy Council, the Economic Innovation and Technology Council and the Order of Manitoba Advisory Council. Because these boards provide policy advice to government and do not make decisions binding the government, partisanship would be expected to influence most of the appointments.

Many boards are easy to classify using this typology and others require a closer examination of their statutory mandate to make this determination. For example, while the Manitoba Clean Environment Commission (CEC) has some defined regulatory functions, both the preamble of its enabling legislation and the specific provisions of the Act seem to indicate that its mandated role is advisory. Section 1 of *The Environment Act*²¹ states that one purpose of the Act is to “provide[] for public consultation in environmental decision making while recognizing the responsibility of elected governments including municipal governments as decision makers” and section 6 provides that this commission gives “advice and recommendations” to the government and facilitates public participation.²² In some situations, if the minister decides not to follow the CEC advice, he or she is required to give reasons for taking a different approach. Thus, it would appear that the CEC is an advisory board. However, the CEC conducts public hearings that strive for a high degree of procedural fairness. Members should have significant technical and scientific knowledge, and on that basis their function appears to be regulatory. Further, in practice, most, if not all CEC recommendations have been accepted by the government and incorporated into environmental licenses so, *de facto*, some would say that it is a regulatory board.

C. CONCLUSION

Merit should be the overriding consideration for any appointment to an administrative board, especially to those boards with complex and technical decision making obligations or where independence is important. For example, the primary criterion for appointment to adjudicative and some regulatory tribunals should be to ensure that the best person available is appointed. The important individual rights related decisions and the fact that the government is often a party in these cases demand that excellence and impartiality be the guiding considerations. While a shared political philosophy may be an appropriate consideration for appointments to other types of boards, neither the need for accountability nor an implicit expectation that appointees will do the government’s bidding are appropriate justifications for partisan considerations to influence adjudicative or some regulatory board appointments. Ultimately, care should be taken to eliminate or, at least, monitor (depending on the type of board) the influence of partisan considerations during the process.

²¹ C.C.S.M. c. E125.

²² *Ibid.*

Where the board's function is to make policy and give advice pursuant to a general statutory mandate (as distinct from an adjudicative or regulatory board) and the need for independence is not as significant, the government can be justified in appointing those who share their political philosophy. Since *The Human Rights Code* prohibits discrimination based on political belief, affiliation or activity unless such a belief is an express bona fide qualification, the government needs to be clearer about when it believes that such affiliations are legitimate considerations.

CHAPTER 3

OVERVIEW OF FORMAL AND INFORMAL APPOINTMENTS MECHANISMS

A. FORMAL MECHANISMS

The formal mechanism for exercising an appointment power is set out in the legislation creating the board.¹ Four formal appointing mechanisms are used in Canadian jurisdictions: (1) Order in Council appointments; (2) ministerial appointments; (3) internal agency appointments; and (4) constituency based or party choice appointments. Most board appointments are either Order in Council or ministerial appointments and these appointments are the focus of this report.

1. Order in Council Appointments

Order in Council appointments occur at the provincial level when the Executive Council (more commonly called the Cabinet), as the appointing authority, makes an Order in Council that is signed either by the premier or another minister and the Lieutenant Governor. Federally, Governor in Council appointments are formally used to make appointments to most federal administrative boards (and are approved by the Governor General in Council). They are made on the advice of the Privy Council Office staff but they are handled through a process which recognizes the Prime Minister's prerogative to make final decisions on all appointments, with recognition that such appointments are usually based on the recommendation of a minister.² There are more than 200 federal boards and they have about 2000 full and part time board

¹ For an excellent review on formal appointment options, see Angela Weltz and Wendi J. Mackay, "Appointments: A Policy Framework for Administrative Tribunals: A Background Paper", Administrative Justice Project, (Ministry of the Attorney-General, Victoria, British Columbia 2002) at 4-7 online: <<http://www.gov.bc.ca/ajo>>. The summary of appointment mechanisms given in this section is adapted from this background paper.

² Treasury Board of Canada Secretariat, *Reports on Planning and Priorities for the Privy Council Office and Public Appointments Commission Secretariat* (2008-2009), online: <www.tbs-sct.gc.ca/rpp/2008-2009/inst/pco/pc010-eng.asp>. Also see Report of the Office of the Auditor General of Canada, *Governor in Council Appointments Process*, Chapter 2 in the *Status Report of the Auditor General of Canada to the House of Commons* (2009), online: <http://www.oag-bvg.gc.ca/internet/English/parl_oag_200903_02_e_32289.html>.

members³ and Manitoba has about 160 boards with 1500 appointees.⁴ In theory, the Order in Council process subjects prospective appointees to collective scrutiny by all the ministers of the Crown although in practice, given the large number and diversity of appointments, neither Cabinet nor even the minister, Prime Minister or Premier can scrutinize appointments in much detail.

Most administrative board appointments are made by Order in Council. Generally, Order in Council appointments are the preferred form of appointments in the following situations:

- where an administrative board plays a strategic role in implementing government policy;
- where a paramount consideration is ensuring public confidence in the independence of the decision maker;
- where government is a party before the board and that board adjudicates individual rights and benefits; or
- where decisions of the staff of the board's host ministry are reviewed by that board.⁵

2. Ministerial Appointments

Ministerial appointments are used for the following appointments:

- to advisory bodies;
- to some adjudicative boards; and
- to some programs that require investigators or administrators.⁶

³ Governor in Council website: <<http://www.appointments-nominations.gc.ca/index>>. According to one media account, the federal government made 600 appointments in 2008 (See Glen McGregor, "Harper government ramps up appointments to federal posts" *Ottawa Citizen* (15 January 2009), online: <<http://www.canada.com/ottawacitizen/news/story.html?id=d90de4a3-020d-414d-b113-382200ab36b1>>). A 2006 report stated that there are approximately 500 full time and 1900 part time Governor in Council appointments to agencies, boards and Crown corporations: Lydia Scratch, "Governor in Council Appointments: Recent Changes and Suggestions for Reform", *Parliamentary Information and Research Service* (May 17, 2006), online: <<http://www.parl.gc.ca/information/library/PRBpubs/prb0621-e.htm>>. It is not clear why the website figures are different from Scratch's figures, even factoring successive governments' commitments to reducing the numbers of boards and appointments, or perhaps the website figure only refers to Order in Council but not ministerial appointments. However, either of these figures supports the assertion that the volume and diversity of appointments precludes Cabinet or even the minister from exercising significant oversight or having the expertise to assess qualifications of proposed candidates.

⁴ Becky Barrett, Panel Presentation at the Manitoba Council of Administrative Tribunals 3rd Annual Conference, Winnipeg, April 2008.

⁵ Weltz and Mackay, *supra* note 1.

⁶ *Ibid.*

Such appointments are used when the prospective appointee has specialized technical or professional expertise that can be assessed by ministerial scrutiny but for which full collective scrutiny by Cabinet is not necessary. Ministerial appointments should not be used when the minister appears as a party in the board's proceedings or when staff decisions are reviewed by that board. They are typically preferred where the discretion of the decision maker is clearly defined in the relevant legislation. It has been observed that:

In a decentralized public service model, ministerial appointments are preferred unless there are compelling reasons to require Cabinet oversight or the institution's mandate is such that the Minister's direct and final approval of appointments could be perceived as detracting from the independence and integrity of the administrative institution itself.⁷

3. Standing Committees

Parliament and the legislatures in Ontario, Nova Scotia, New Brunswick and the Yukon also have a role in board appointments through standing committee review, with varying review frequency. The Yukon Committee reviews all appointments to nine significant administrative boards. The Ontario Standing Committee reviews about 10% of all appointments⁸ and the New Brunswick Committee does not seem to have met for a decade. Generally speaking, the appropriate standing committee can request that a potential appointee appear to answer questions about their qualifications. Most standing committees only have a comment power (for example, federal standing committees can declare a candidate to be "suitable" or "unsuitable") but the Nova Scotia Standing Committee has a (rarely exercised) veto power. According to one commentator, "legislative oversight is based on the premise that the prospect of negative publicity should deter the cabinet from indulging in the more egregious patronage appointments, where the candidate's only evident qualification is a connection to the governing party."⁹

4. Conclusion

Other than setting out the formal mechanisms for making appointments, there are few statutory provisions in Manitoba or other Canadian jurisdictions (with the notable exceptions of Quebec, British Columbia and Canada) concerning the board appointments process. In most cases, Manitoba legislation does not set out process provisions unless the following situations occur: a requirement for constituency based consultations; the appointment is to a self-governing

⁷ Wendi J. Mackay, "Administrative Institutions From Principles to Practise: Guidelines for Review and Design" (2006) 19 Canadian Journal of Administrative Law and Policy 63 at 88.

⁸ David Pond, "Legislative Control of Cabinet Appointments to the Public Service: A Canadian Case-Study in the Political Limits of Parliamentary Reform" (2008) 61 Parliamentary Affairs 52.

⁹ David Pond, "Legislative Oversight of Political Patronage in Canada" (2008) 46 Commonwealth and Comparative Politics 365 at 366.

profession or trade-related board which has been charged with managing its own appointments process; or the board is elected such as a municipal council or school board. Thus, legislation rarely says anything about how positions will be advertised or what application or screening processes need to be used.¹⁰

No legislation expressly requires that the best qualified person should be appointed to board positions, although statutes in British Columbia and at the federal level refer, respectively, to a “merit-based process” and appointments “based on merit”.¹¹ Provincial legislation establishing an administrative board often does not set out any required qualifications or experience¹² or, if it does, the qualifications are often very general. Even the requirement that, for example, a lawyer must be appointed, does not specify what special skills or experience that lawyer must or should have.

B. INFORMAL MECHANISMS

In the absence of formal statutory requirements, informal policies have been used to generate lists of potential board appointees. Until recently, most governments across Canada relied on a small staff housed within the Executive Council Office to advise Cabinet members on board appointments. Little is known by the general (or even the more inquiring) public about the informal mechanisms used to make appointments decisions including what positions are available, the criteria for filling them, what processes are used to screen names through to ministers or Cabinet or who is appointed to positions. As will be discussed in the next part of this report, most governments that have engaged in an appointments policy review have accepted in principle that the new process must be open, transparent and accountable and that appointments must be merit-based rather than based on political affiliation. Yet there are differences in the approaches taken by these governments.

Some of the questions that can be asked about informal policies in each jurisdiction include the following:

I. Is the process open and transparent? Can those interested in an appointment find out about vacancies and are the qualifications and remuneration clearly set out at the application stage? Is the advertising process wide enough to ensure that all qualified candidates will be aware of openings and should steps be

¹⁰ Federal legislation was passed in 2006 establishing the Public Appointments Commission and charging it with ensuring that every appointments process “is widely made public and conducted in a fair, open and transparent manner”. However, no one has been appointed to this body and, as will be discussed, the federal process has not significantly changed since the passage of this legislation.

¹¹ See Chapter 4 regarding the board appointment policies in other jurisdictions.

¹² For example, no qualifications are set out in legislation in Manitoba for appointments to boards as significant as the Municipal Board, Clean Environment Commission, Public Utilities Board and for adjudicators under *The Human Rights Code*, C.C.S.M. c. H175.

taken to encourage members of historically under-represented groups to apply? Is the process used to make decisions publicly known?

2. *Is the process designed to ensure that appointments are based on merit rather than political affiliation or partisanship?* This issue gives rise to four related issues:

- i) Are merit-based qualifications established and publicized?* Are the stated qualifications limited to the statutory requirements? If not, how detailed are the qualifications, who determines what the desirable qualifications are, and are they known to candidates in advance? Is there a clear express statement either in statute or a policy that the merit principle is the guiding principle in appointments? To what extent, if any, should considerations such as gender, language, region, disability, ethnicity or Aboriginal status have an influence on the selection criteria?
- ii) Are processes in place to minimize political influences at the pre-recommendation stage?* Who leads the initial screening and selection processes (the department, the minister, the board) and who else has a role in these processes? Does legislation or a policy expressly provide that a board chair must be involved in appointment decisions? Is the unit charged with management and oversight of the appointments housed in the Executive Council Office or in a less political department responsible for the process? Should screening committee members or appointees be required to affirm their impartiality in all aspects of either the selection process or in the administrative decision-making with which they are ultimately charged?
- iii) What does it mean to be “qualified”?* Is the objective to screen through to the appointing authority the “best qualified candidate(s)” (a standard of relative merit) or simply all “qualified candidates” (a standard of individual merit)? Does the selection committee pass on to the decision maker a single name, a ranked short list or the names of all qualified candidates? If more than one candidate is presented, what other information about candidates’ qualifications is presented?
- iv) Does political affiliation have a role in board appointments?* What role, if any, should political affiliation continue to play in the appointments process? Should appointments policies contain greater protections against the potential for partisanship to influence the process for appointments to adjudicative and, perhaps, some regulatory boards while permitting more influence for appointments to advisory committees and boards governing Crown agencies and enterprises?

3. *Is the process accountable?* How is implementation of the policy monitored? Are names, qualifications and significant political affiliations of successful applicants announced? Is the process capable of monitoring or oversight before or after the final appointment is made to ensure that merit was the basis for the appointment and to ensure that appropriate processes were used in making the decision? Is there a role for house standing committees? Should a body charged with general oversight and monitoring of implementation of the process also be charged with preparing an Annual Report?

CHAPTER 4

BOARD APPOINTMENTS POLICIES IN OTHER JURISDICTIONS

A. NOVA SCOTIA

As most Canadian jurisdictions revised their appointments policies after Nova Scotia made significant reforms to its appointments process in 2002,¹ it is useful to start with the Nova Scotia experience and compare it with the processes subsequently established in other jurisdictions.

1. History of Reform

In the 1990s, successive Nova Scotia governments promised to end political patronage.² In 1995, Dalhousie law professor Archibald Kaiser, an expert in mental health law, filed a human rights complaint alleging that his applications for appointment to two mental health-related boards were rejected on the prohibited ground of political belief or affiliation because he was not a partisan Liberal. Motivated by growing public disenchantment with patronage and, perhaps, by Kaiser's complaint, some efforts were made by the provincial government to reform the appointments process. For example, at the request of the Minister of Justice, the Law Reform Commission of Nova Scotia published a discussion paper and a final report on the administrative justice system that included suggestions for reforming the appointments process.³ The Nova Scotia Law Reform Commission Final Report recommended that:

The appointment process for agencies must also be designed to ensure that there is public confidence in the agency. The appointment process should be "transparent", in that the criteria or qualifications for an appointment should be consistent with the purposes of the agency and should be publicly available. The process for identifying and selecting people for appointment should be equally transparent.⁴

¹ Peter Aucoin and Elisabeth Goodyear-Grant, "Designing a Merit Based Process for Appointing Boards of ABCs: Lessons from the Nova Scotia Reform Experience" (2002) 45 Canadian Public Administration 301-327 at 303.

² For a fuller discussion see, for example, Jennifer Smith and Lori Turnbull, "On the cusp of change? The Nova Scotia House of Assembly" (2008) Canadian Parliamentary Review 13, Aucoin and Goodyear-Grant, *ibid.* and David Pond, "Legislative Oversight of Political Patronage in Canada" (2008) 46 Commonwealth and Comparative Politics 365 at 366 [Legislative Oversight].

³ Law Reform Commission of Nova Scotia, *Discussion Report: Agencies, Boards and Commissions, The Administrative Justice System in Nova Scotia*, (February 1996) and Law Reform Commission of Nova Scotia, *Final Report: Reform of the Administrative Justice System in Nova Scotia*, (January 1997), [Law Reform Commission of Nova Scotia Final Report].

⁴ Law Reform Commission of Nova Scotia Final Report, *ibid.*

In 1999, then-Premier John Savage announced a new requirement that all board positions be advertised and that screening panels would review potential appointees to administrative boards. However the responsible minister would create the panel, there was no requirement that the selection criteria be made public (contrary to the recommendations made by the Nova Scotia Law Reform Commission of Nova Scotia) and a house standing committee would have the power to review and veto potential appointees. In 2000, the government adopted a process for making appointments to the powerful Utility and Review Board that would ensure better and less partisan screening for expertise, require the use of a “best qualified” short list and eliminate the use of standing committee review. This appointments process was then adopted for appointments to some other significant boards. With these developments, Nova Scotia was one of the first Canadian jurisdictions to attempt significant changes to some board appointments process, albeit on an *ad hoc* basis.

During this period of change to the appointments process, the Kaiser human rights complaint was still simmering in Nova Scotia. It was finally scheduled for a full public hearing in 2002. A human rights staff report prepared for this case found that “the evidence does support that there was a context of systematic political patronage in ABC appointments.”⁵ Shortly before the hearing into this complaint was to commence, the government reached a settlement with Kaiser and the Human Rights Commission. It has been suggested that this settlement was achieved in part to avoid having the province’s leading politicians testify in open public hearings about their own government’s practices regarding appointments to administrative boards.⁶

2. Best Candidate Objective

The terms of the Kaiser Settlement provided that “the fundamental goal of any public appointments process is to select the best candidate, as determined by the selection process, for any office”.⁷ It has been suggested that this goal “uniquely sets the merit standard as relative merit, that is the appointment of the most qualified of all applicants, and not merely a qualified candidate.”⁸ The Kaiser Settlement terms provided that to achieve the “best candidate” objective, the process include the following features: qualifications and other selection criteria must be set in advance and positions must be advertised in a way that would ensure that potential applicants had fair notice; a non-partisan advisory committee composed of a human resources professional,

⁵ Aucoin and Goodyear-Grant, *supra* note 1.

⁶ *Ibid.* at 311.

⁷ In the Matter of The Human Rights Act of Nova Scotia and A Complaint of Discrimination Between H. Archibald Kaiser, the Executive Council of Nova Scotia and the Nova Scotia Human Rights Commission, “Terms of Settlement Agreement” (January 2002). [Kaiser Settlement]. See also: Government of Nova Scotia, “Settlement Agreement Approved in Political Affiliation Complaint”. News Release dated January 23, 2002, online: <www.gov.ns.ca/news/details.asp?id=20020123004>.

⁸ Aucoin and Goodyear-Grant, *supra* note 1 at 304. The use of the best qualified standard was unusual but perhaps not unique in 2002. Alberta has used a “best qualified” standard since 1997 although even its current process could be said to lack transparency and openness and therefore it is difficult to assess this claim.

two lay persons, and two public servants must decide who meets qualifications for appointments to adjudicative boards and the Executive Council will choose the appointee from the short list of qualified candidates provided by the panel; the entire process must be transparent and government must be accountable to the public for its record of appointments; and adjudicative board appointments could not be subject to standing committee review. The Kaiser Settlement terms also stated that the government would provide additional funding to the Human Rights Commission to enable it to undertake steps to educate the public on issues related to discrimination based on political affiliation and mental disability.

3. Selection and Screening Criteria

The Executive Council Office website describes and features links to information on the process for making appointments to both adjudicative and non-adjudicative positions.⁹ Adjudicative boards are defined as quasi-judicial boards that “take evidence, make findings of fact and law, and make decisions affecting a person’s liberty, security, or legal rights. Board members need to apply legal principles as well as sound professional and technical principles for the decisions under their consideration”.¹⁰ Non-adjudicative boards are described as those that “make financial, regulatory, business or policy recommendations/decisions that have far reaching implications for Nova Scotians”.¹¹ The list of non-adjudicative boards includes many significant administrative boards including, for example, the Offshore Petroleum Board, the Board of Police Commissioners, the Human Rights Commission, the Workers’ Compensation Board, and the Film Classifiers under the Alcohol and Gaming Authority. Currently there are 36 adjudicative and about 190 non-adjudicative boards in Nova Scotia. Lists of both types of boards are included on the website along with detailed information about the positions and expected qualifications and other relevant selection criteria. The lists do not contain any information about current appointees, expiry dates for their appointments or vacancies. However, vacancies are advertised widely in the bi-annual call for applications to board positions.

(a) Adjudicative Boards

Applications for appointments to adjudicative boards are screened by “Departmental Advisory Committees.” Such appointments are governed by the overriding principle of selection based on merit, which is defined as an objective assessment of the fit between the skills and qualifications of the prospective candidate and the needs of the agency. The Advisory Committees are composed of a government human resources professional, two civil servants and two lay members. There is no requirement for board participation either in a consultative role or on the Committee. Members on the Departmental Advisory Committees serve two year terms and the process for determining who should be appointed to the committees is set out in a

⁹ Online: <http://www.gov.ns.ca/exec_council/>. This is consistent with the Kaiser Settlement terms.

¹⁰ Online: <http://www.gov.ns.ca/exec_council/abc/adjudicative.asp>.

¹¹ Online: <http://www.gov.ns.ca/exec_council/abc/nonadjudicative.asp>.

policy available on the website.¹² The Committees' composition and the process used for determining who serves on these committees were designed to minimize political influence. Advisory Committees screen the applications received and recommend an unranked short list of between three and six "most qualified candidates" for each position from which the Minister chooses a candidate to recommend for appointment.¹³ Each department is required to maintain accurate and up-to-date profiles (including specific qualifications and relevant work or other experience) on all adjudicative positions for use by the Advisory Committee. These profiles are available on the website. These requirements are largely consistent with the Kaiser Settlement.

(b) Non-Adjudicative Boards

Selection criteria for each non-adjudicative board are listed on the website and open positions are widely advertised; in these ways the openness of the process is no different from that used for adjudicative panels.

The screening process for non-adjudicative boards is different from the process used for adjudicative boards in two respects. Departmental Screening Panels determine who are qualified candidates for appointments to non-adjudicative boards. Screening panel members include both departmental staff and lay members and are selected by ministers on the basis of experience in the area of concern of the department, having regard to expertise, regional representation, gender and racial diversity. The minister can have a significant influence on who sits on the screening panel especially as the two lay members are chosen at the minister's discretion. There is no requirement that a human resources professional be on the panel and, as with adjudicative boards, there is no specific requirement of board chair involvement. As well, departmental screening panels only evaluate whether an individual meets the minimal qualifications for the appointment and do not rank candidates relative to each other. A list of all qualified candidates goes to the minister with no ranking whatsoever on relative merit.

The minister's more significant role in determining composition of the screening panel and use of a "qualified" candidates list rather than a short list of "best qualified" candidates leaves much more room for political partisanship to play a role in appointments to the 190 non-adjudicative boards than for appointments to the 36 adjudicative boards. It is hard to reconcile the "qualified candidate" requirement with the Kaiser Settlement proviso that "the fundamental goal of any public appointments process" is "to select the best candidate, as determined by the selection process, for any office". Given that the qualifications for many boards are very general, the list of minimally qualified candidates for many positions could be quite long. Some

¹² Online: <http://www.gov.ns.ca/exec_council/abc>.

¹³ It has been suggested by Aucoin and Goodyear-Grant, *supra* note 1 at 313 & 324, that the charge of partisanship is inherent in a process that leaves the final decision to the minister of choosing among candidates on a small short list, especially where the process, by agreement in the terms of Kaiser Settlement, keeps the advisory committee reports "strictly confidential" and the names of unsuccessful short listed candidates are not released. They conclude that "if a government wished to have an ABC merit-based appointment system that uses relative merit as its standard, ministers cannot be involved in the selection of candidates for appointments."

commentators have asserted that “there are generous loopholes of open-ended criteria that enable virtually anyone to be considered qualified. Not surprisingly, as a result, almost all applicants are deemed to be qualified for almost all ABCs.”¹⁴

4. Accountability

Adjudicative tribunal appointments are not subject to standing committee review in Nova Scotia. Such a review would do little to enhance assessment of merit-based criteria because some politicians may lack the skill to assess candidates’ professional qualifications. Proposed non-adjudicative board appointments can be reviewed by an all-party Human Resources Standing Committee of the Legislature, after they are approved by Executive Council. Unlike the more limited review and comment power granted to standing committees under the federal and the Ontario processes, the Nova Scotia Standing Committee has a veto power. One rationale for this approval power is to give committee members the ability to identify and publicize patronage appointments, something that might be justified given the greater role patronage can play in non-adjudicative appointments. However, the standing committee has little information upon which to make an assessment as the screening committee reports are not made available to the committee, the minister is not required to appear to justify the decision, the committee rarely exercises their power to interview proposed appointees and the time allotted for committee discussion is very short. In practice, this approval may not mean very much although it may discourage the government from completing the appointment of mediocre, minimally qualified candidates who have well-known political connections.¹⁵

Other than the ineffective standing committee review, there are no accountability mechanisms. No one is charged with oversight over the process and there are no easily accessible public records of appointments or information about appointees and their qualifications.¹⁶ Without such mechanisms, it is difficult to see how “the entire public appointments process must be able to be scrutinized by the public” or how the government can be held “accountable to the public for its record of public appointments” as required by the Kaiser Settlement.¹⁷ Little information could be found about who currently serves on either adjudicative or non-adjudicative boards in Nova Scotia.

¹⁴ Aucoin and Goodyear-Grant, *ibid.* at 312.

¹⁵ *Ibid.* and Pond, “Legislative Oversight” *supra* note 2.

¹⁶ Order in Council appointments may be in the Nova Scotia’s Royal Gazette but this document is not available online.

¹⁷ Terms of Kaiser Settlement, Section (E)(g) and (h) *supra* note 7.

5. Summary

The Nova Scotia appointments policy is open and transparent as all positions are advertised, job descriptions and qualifications are established and the process used to make determinations is known. The policy clearly states that the purpose of the process is to appoint the "best candidate". The adjudicative positions process is merit-based because the qualifications are quite detailed and the process is designed to minimize partisan influences by the establishment of an advisory committee and the use of a short list of best qualified candidates. The process used for non-adjudicative positions is less well designed to achieve the objective of merit-based, non-partisan appointments because qualifications are not detailed, the minister has more influence over the screening panel and a list of all qualified candidates is sent to the appointing authority. Neither process expressly contemplates a role for the board chair. Accountability mechanisms overall are weak because names and short biographies of administrative board members are not publicly available, no agency is charged with a general oversight function and the legislative review committee, while still formally capable of reviewing decisions, rarely exercises this power.

B. BRITISH COLUMBIA

A review of administrative board processes revealed that the British Columbian system relied heavily on informal rather than structured approaches to recruitment, selection, appointment, reappointment, performance evaluation and remedial or disciplinary measures for tribunal members.¹⁸ "Typically, word of mouth, personal contacts and consultation with relevant communities are used to get names" of potential appointees although it was noted that boards seemed to be largely unaware of where members came from and what recruitment methods were used.¹⁹ Job descriptions were not used for more than 70 per cent of the appointments. Almost half the appointments were made without any consultations with the board chair or other stakeholders and among those who were consulted, many stated that the consultation was minimal.²⁰

1. Review of Administrative Justice

In July 2001, the British Columbia government initiated a system-wide review of administrative justice. The Administrative Justice Office commissioned research and discussion papers and facilitated wide-ranging consultative processes. In August 2002, a White Paper was published setting out more than 50 recommendations on how to enhance administrative justice in

¹⁸ Philip Bryden and Ron Hatch, "British Columbia Council for Administrative Tribunals Research and Policy Committee—Report on Independence, Accountability and Appointment Processes in British Columbia Tribunals" (1988-89) 12 Canadian Journal of Administrative Law and Policy 235.

¹⁹ *Ibid.* at 252-253.

²⁰ *Ibid.*

that province. To achieve the objectives of a transparent, fair and open and merit-based system, the White Paper recommended that:²¹

- An annual recruitment plan be prepared for each tribunal setting out, amongst other things, the roles for government and the tribunal and the process that would be used to fill the appointments;
- Tribunal chairs play an active role in the process;
- Job descriptions be established;
- Recruitment and selection be based on open, transparent and competitive processes proportionate to the nature of the positions being filled and subject to monitoring and auditing by the Board Resourcing and Development Office; and
- The Board Resourcing and Development Office continue to take the lead in the recruitment of chairs and that chairs take the lead in recruitment of board members.

2. The *Administrative Justice Act*

The British Columbia government accepted these recommendations and initiated major reforms to the appointments processes in 2003 by enacting the *Administrative Tribunal Appointments and Administration Act* and the *Administrative Tribunals Act* in 2004.²² The *Administrative Tribunals Act* is intended to apply to all administrative boards that have adjudicative and regulatory functions with some exceptions.²³ It does not apply to Crown corporations and policy advisory boards although the appointments policy adopted by the

²¹ Administrative Justice Office (AJO), *On Balance: Guiding Principles for Administrative Justice Reform in British Columbia*, (July 2002) at 13-16, online: <http://www.gov.bc.ca/ajo/down/white_paper.pdf> [The White Paper]. The White Paper's recommendations on appointments drew heavily on two other reports prepared for the AJO: Angela Weltz and Wendi J. Mackay, "Appointments: A Policy Framework for Administrative Tribunals: A Background Paper", Administrative Justice Project, (Ministry of the Attorney-General, Victoria, British Columbia 2002), at 70-79, online: <<http://www.gov.bc.ca/ajo>> and, "Making Sound Appointments: Report and Recommendations: A Report prepared for the Attorney General", Administrative Justice Project, (July 2002), online: <<http://www.gov.bc.ca/ajo>>.

²² The *Administrative Tribunal Appointments and Administration Act*, S.B.C. 2003 c. 47 and the *Administrative Tribunals Act*, S.B.C. 2004 c. 45 [*Administrative Tribunals Act*]. The *Administrative Tribunal Appointments and Administration Act* was, effectively, rolled into the more comprehensive *Administrative Tribunals Act* in 2004, although the former is still enforce as it applies to some tribunals not covered by the *Administrative Tribunals Act*. For an overview of the reform process in British Columbia see Dianne Flood, "British Columbia's Tribunal Appointment Reforms—Balancing Independence and Accountability". (Paper presented at the Manitoba Council of Administrative Tribunals Annual Conference, Winnipeg, April 2008) [unpublished], online: <http://www.gov.bc.ca/ajo/popt/mcat_2008_conference.htm>.

²³ For example, it does not apply to all decision makers who have adjudicative functions such as the Information and Privacy Commissioner, some professional governing bodies, municipalities or decision makers who are not organized into tribunals even though they have adjudicative powers under statute.

government for such appointments is similar to the process used for adjudicative boards.²⁴ Other significant reforms were accomplished through this legislation such as standardized procedural frameworks and secure tenure provisions. The principles animating this legislation are that administrative boards should be independent and accountable. These principles are furthered when board appointments are merit-based, made following an open and transparent process, when appointees enjoy a secure tenure, and when the board chair is responsible for overseeing effective board management. Prior to the passage of this legislation, the government had abolished a number of small boards by moving their functions to larger boards and eliminating unnecessary review and appeal processes thereby increasing administrative efficiency and reducing the number of part time appointments required.²⁵

The *Administrative Tribunals Act* provides that tribunal chairs are appointed “after a merit-based process” and other members are appointed only after a “merit-based process and consultation with the chair”. British Columbia is the only provincial jurisdiction to legislate that a merit-based process be used; all of the jurisdictions that have revised their appointments policies have proceeded by way of policy directive. British Columbia is the only Canadian jurisdiction to have clearly codified and operationalized a general board consultation requirement, although the operative policies in some jurisdictions (for example, Alberta) or for some boards (for example, the federal Immigration and Appeal Board)²⁶ have included provision for board involvement either in a consultative capacity or with membership on the screening committee. The statutory requirement for consultation with the chair helps to ensure that the views of the chair and the tribunals’ operational requirements are key considerations for the appointing authority.

3. Appointment Guidelines

The following three central offices in British Columbia support agency governance, provide research on administrative law issues and oversee the appointments process: (1) the Crown Agencies Secretariat; (2) the Administrative Justice Office; and (3) the Board Resourcing

²⁴ Board Resourcing and Development Office, *Appointment Guidelines: Governing Boards and other Public Sector Organizations* (August 2001, revised May 2007), online: <http://www.lcs.gov.bc.ca/brdo/appoint/AppointmentGuidelines_PublicAgencies.pdf>. The guidelines governing board appointments to public sector organizations such as health authorities and Crown corporations and for government appointees to other boards of directors such as universities use the same merit-based principle that is used in the administrative tribunals guidelines and contemplate a significant role for the current board in stating needs and required competencies, identifying potential candidates (through its nominating committee) and assessing candidates. A short list of qualified candidates in preferred order is to be provided to the minister.

²⁵ Philip Bryden, “New Developments in Tribunal Reform: Lessons from British Columbia” (presented at The Future of Administrative Justice Symposium, Faculty of Law, University of Toronto, 17 January 2008), online: <http://www.law.utoronto.ca/documents/conferences/adminjustice08_bryden.pdf>.

²⁶ As described further in this chapter, the selection process used to appoint members of the federal Immigration and Refugee Board requires the use of a selection board that is chaired by the board chair and has three ministerial appointees and three board appointees, giving the board chair effective control over the selection process.

and Development Office (BRDO).²⁷ These offices are all housed outside of the Executive Counsel Office, whereas the units or secretariats supporting appointments in other Canadian jurisdictions, (with the exception of Ontario) have all remained housed in the politicized environment of the Executive Council Office or Privy Council Office.

The BRDO has a very active role in managing the appointments process. It sets guidelines for all provincial appointments to agencies; maintains a website containing information on positions and how to apply for them; develops appropriate recruitment and selection processes; confirms the roles to be assumed as between itself, the board and the department in specific recruitment initiatives; identifies and seeks out potential candidates; carries out due diligence checks on potential candidates; and approves the list of qualified candidates that goes forward to the appointing authority.²⁸ The BRDO is a unit within the Department of Labour and Citizenship Services.

The primary authority for the composition and structure of appointments in British Columbia is still the tribunal's enabling legislation. The merit-based process itself is not set out in the *Administrative Tribunals Act* as it is expected that the tribunals, ministries and BRDO will develop processes that are appropriate to each tribunal. The BRDO's website lists all vacant board positions and sets out policies on the recruitment and selection process. Of particular note is the BRDO's *Appointment Guidelines for Administrative Tribunals* which sets out the policies and processes to be used for all appointments and reappointments to administrative tribunals in British Columbia.²⁹

According to the *Appointment Guidelines For Administrative Tribunals*, the following principles govern all appointments processes:

Merit-Based: Appointments are governed by the overriding principle of selection based on merit, that is, an objective assessment of the fit between the skills and qualifications of the prospective candidate and the needs of the agency.

²⁷ (1) The Crown Agencies Secretariat provides governance support and strategic oversight. (2) The Administrative Justice Office (AJO) was established within the Ministry of the Attorney General "to research and advise government, ministries and administrative tribunals on administrative justice reform initiatives and opportunities for on-going improvements to British Columbia's administrative justice system", see the AJO's website at <<http://www.gov.bc.ca/ajo>>. (3) The Board Resourcing and Development Office (BRDO) ensures "that all provincial appointment are made on the basis of merit following an open, transparent and consistent appointment process; and ensuring that appointees receive appropriate orientation and ongoing professional development with respect to agency governance issues." See the BRDO website at: <<http://www.lcs.gov.bc.ca/brdo/appoint/index.asp>>.

²⁸ This role can be contrasted with the role of the British Commissioner of Public Appointments (described later) who plays no role in specific appointments but, since developing an appointments process, functions mainly in an oversight role carried out both through regular audits and complaints based review.

²⁹ Online: <http://www.lcs.gov.bc.ca/brdo/appoint/AdminTribGuide_101203.pdf>.

Professional Contribution, Reputation and Esteem: Nominees for appointment will also be assessed, where appropriate, on the basis of contribution to their profession, reputation in their chosen field and respect garnered amongst professional colleagues, associates and adversaries.³⁰

Transparent: The appointment process guidelines are clear and understandable and available to the public.

Consistent: The appointment process is applied consistently in respect of all appointments to agencies.

Probity: Agency members must be committed to the principles and values of public service and perform their duties with integrity.

Proportionate: The appointments process is subject to the principle of proportionality; that is, the process is to be appropriate for the nature of the position and its responsibilities.

The preamble to the principles states that the “make-up of these tribunals should take into account the characteristics and diversity of the communities that are served by them”.

The host ministry and the tribunal chair are expected to reach an agreement on who will take a lead role and who will play a supporting role in the recruitment and selection process for all appointments to that board. The guidelines set out, in detail, the processes expected to be used by both the lead and the supporting actors, how the BRDO will be involved, including details such as who will be on selection committees and what forms of assessment can be used. The British Columbia policy has a unique feature in that it requires that nominees, where appropriate, be evaluated for their professional contribution, reputation and esteem. It is expected that all players will cooperate and communicate with each other throughout the process. In most cases, the candidates recommended to the minister or Lieutenant Governor will be listed in preferred order and the list should include more names than positions to be filled.

The BRDO website includes a list of all appointments made in the previous 30 days. Website users can also easily link into all boards and get detailed information on the qualifications of most, if not all, board members. It should also be noted that the BRDO is the only active unit in Canada charged with general oversight and monitoring of the appointments process.³¹

³⁰ This principle appears in the actual guidelines (which were last amended in October 2007) but it does not appear in the list of governing principles featured on the BRDO website.

³¹ The federal Public Appointments Secretariat is also charged with general oversight but it has not been staffed even though legislation establishing the secretariat came into law in December 2006.

4. Summary

By almost any criteria, the British Columbia appointments regime is open and transparent, merit-based and accountable. More than any other Canadian appointments regime, it attempts to make the process less influenced by partisanship by requiring board chair involvement, housing the unit supporting appointments outside the Executive Council Office, establishing specific and objective qualifications that are more detailed than the minimal qualifications set out in legislation, and using a ranked short list. Information about the successful applicants is publicly available and the BRDO is charged with providing general oversight on the appointments process.

C. ONTARIO

1. History of Reform

Calls for reform to the appointments process in Ontario have come from various quarters. In 1989, the Ontario government commissioned a report from former member of the Legislative Assembly of Ontario, Robert Macaulay, on the structure and administration of the Ontario administrative justice system.³² The Macaulay Report recommended that the appointments process in Ontario be more open and that a council be formed and charged with, among other things, seeking out candidates, and interviewing and assessing them. It further recommended that board chairs be consulted about the suitability of candidates before appointment. In 1997 (with a few revisions since then), the Society of Ontario Adjudicators and Regulators (SOAR) published “Principles for Appointments to Adjudicative/Regulatory Tribunals.”³³ SOAR recommended that the Ontario government pass legislation mandating an appointments process requiring wide notice and clear criteria and established selection processes; that a central agency be established and charged with, among other things, establishing core competencies for all boards and working with board chairs to establish specialized competencies of particular boards; using selection committees with representatives from the public service, the premier’s office and client communities; and that board chairs should have a key role in the selection process. The Administrative Justice Working Group (AJWG) has called on the Ontario government “to commit itself to an open, transparent, accessible, merit-based and competitive process to the recruitment and appointment of members to Ontario’s quasi-judicial rights tribunals.”³⁴ Many of its recommendations are similar to those presented in the Macaulay Report and by SOAR,

³² Robert W. Macaulay, *Directions: Review of Ontario’s Regulatory Agencies Report*, (Toronto: Queen’s Printer for Ontario, 1989) [Macaulay Report].

³³ Online: <<https://soar.on.ca/docs/Principles%20for%20Appointments.pdf>>. SOAR is an organization comprised of chairs, members and executive staff of administrative justice system agencies in Ontario.

³⁴ Administrative Justice Working Group, “Recommendations to Improve the Appointments Process for Ontario’s Non-Regulatory Tribunals” (February 2005) as quoted in Lorne Sossin, “The Uneasy Relationship between Independence and Appointments in Canadian Administrative Law” in Grant Huscroft and Michael Taggart (eds), *Inside Outside Canadian Administrative Law: Essays in Honour of David Mullan* (Toronto, University of Toronto Press: 2006) at 78. As noted in Chapter 1, note 2, the AJWG is a group of administrative justice professionals.

although the AJWG stresses the need for a competitive process led by the board chair, statutory entrenchment of key aspects of the reformed process and the creation of an Administrative Justice Policy Committee that would consider and approve province wide guidelines in a variety of areas including member recruitment.

2. The Public Appointments Secretariat

Reform of the Ontario board appointments process has been gradual and the government “has yet to engage in any comprehensive appointments reform”.³⁵ No statutory amendments have been made and no general appointments policy is publicly accessible. The reforms appear to have taken place mainly at the level of practice. In September 1990, the then-new Ontario Premier, Bob Rae, announced that his government would “appoint people of ability and talent without regard to their previous political affiliation... [t]he key thing is public confidence, public trust.”³⁶ The Public Appointments Secretariat was established to coordinate board appointments. An advertising campaign was undertaken to ensure that Ontarians would know when positions became open and the qualifications and remuneration for the positions.

The Public Appointments Secretariat is currently housed in the Ministry of Government Services. Its website, under the heading “Principles Governing the Appointments Process” asserts that:

The mission of the Public Appointments Secretariat is to ensure that the most qualified men and women having the highest personal and professional integrity serve the public on the Province's agencies, boards and commissions. Persons selected to serve must reflect the true face of Ontario in terms of diversity and regional representation.³⁷

(a) Openness and Transparency

The government also asserts a commitment to a more open and transparent system. Positions have been advertised on the website since 2004 and, since January 2007, all positions must be advertised and persons applying to serve on any government agency, board or commission must apply through the Public Appointments Secretariat. The website lists positions for which applications are currently being accepted and anticipated vacancies and, while some of the position listings have detailed information on positions descriptions and core qualifications, many listings are quite general.

³⁵ Sossin, *ibid.* at 71.

³⁶ *Toronto Star*, September 15, 1990, October 3, 1990 as cited in David Pond, “Legislative Control of Cabinet Appointments to the Public Service: A Canadian Case-Study in the Political Limits of Parliamentary Reform”, (2008) 61 Parliamentary Affairs 52 [“Legislative Control”].

³⁷ Online: <<http://www.pas.gov.on.ca/scripts/en/home.asp>>.

Currently, the Management Board Secretariat requires all administrative boards to complete position description and core competency reports.³⁸ While it is not clear whether they are used in the selection process, such documents would, if used in these ways, establish clear selection criteria for open positions. Also, it is not clear whether these documents only contain formal statutory requirements or whether desirable personal qualifications and board needs are reflected. There is some evidence to suggest that since 2000, “a number of statutes in Ontario were amended to state clearly that appointees did not have to have any specific qualifications in order to act.”³⁹ It has been suggested that these amendments apparently were made in response to the a 2000 decision from the Supreme Court of Canada,⁴⁰ wherein the court quashed the appointment of retired judges to hospital labour arbitration boards on the ground that there was no evidence whatsoever that these appointees met the statutory criteria for appointment, namely that they were “qualified to act”.⁴¹ The potential for judicial review on this ground is eliminated if the legislation does not set out qualifications.

The public appointments process used in Ontario is open in the sense that all positions are advertised and the qualifications for positions are established in advance. However, if the qualifications set out are only the statutory minimums (as is the case for many of the advertised or upcoming positions) there is more leeway for partisan considerations to figure into the process as so many candidates will meet the basic statutory qualifications. As well, the Ministry of Government Services’ website has no other information about the processes used to make determinations and therefore it cannot be said with confidence that the process is transparent. Most importantly, there is no information online as to who screens and evaluates the applications and what information is passed on to the appointing authority. In a speech in 2008, a senior official with the Public Appointments Secretariat stated that paneled interviews are conducted for chair positions but it was not stated who, typically, would be on the panel.⁴² It was further stated that board chairs are often best placed to determine who should be appointed to their boards and noted that chairs often interview candidates and make recommendations for board appointments.⁴³

³⁸ Management Board Secretariat, *Agency Governance Tools*, online: <<http://www.gov.on.ca/mgs/en/AbtMin/157218.html>>.

³⁹ Sossin *supra* note 34 at 64.

⁴⁰ In *CUPE v. Ontario (Minister of Labour)*, 2003 SCC 29, [2003] 1 S.C.R. 539 (often referred to as the “Retired Judges” case) the Court rejected the union’s argument that an “entrenched appointments process” had been established and must be followed. The Court found that the statute was clear that the appointing power resided in the minister and was subject only to the express constraints in the legislation. The legislation provided that the minister had to be satisfied that the appointees were “qualified to act”. But, as there was no evidence that the minister actually considered the issue of whether all retired judges were “qualified to act” the appointments were quashed.

⁴¹ Sossin *supra* note 34 at 64.

⁴² Debra Roberts, “New Frontiers of Merit in Tribunal Appointment” (presented to the Future of Administrative Justice Symposium, Faculty of Law, University of Toronto, 17 January 2008), online: <http://www.law.utoronto.ca/visitors_content.asp?itemPath=5/7/3/0/0&contentId=1694#Video>.

⁴³ *Ibid.*

The issue of what influence, if any, the appointing authority has over the selection process, especially the choice of who is involved in screening, prior to the recommendation stage and whether the authority expects to be provided with a ranked short list of best qualified candidates or a list of all qualified candidates, is an important determinant in assessing whether the process is designed to ensure merit-based appointments and minimize the impact of political affiliation. This having been said, it is worth repeating that the Public Appointments Secretariat does assert that its mission is to “ensure that the most qualified” candidates are appointed to boards.

(b) Accountability

New appointments, along with links to biographical details and the board’s home website, are announced on the Public Appointments Secretariat website. Such announcements are very important accountability mechanisms and yet, surprisingly, only Ontario and British Columbia have consistently announced all appointments together with a biographical sketch of the successful candidate. The Public Appointments Secretariat does not have an express oversight function and it does not appear to perform such a role in a systematic way.

The House Standing Committee on Government Agencies was established in the early 1990s at the same time as the Public Appointments Secretariat. It has the right to review intended appointees who may be requested to appear before the Committee to discuss their qualifications. While the Committee does not have a veto, it reports back on whether it concurs with the appointment. However, the Committee has very little information about the intended appointees; the members are not even given the potential appointees’ resumes. According to one commentator, the Standing Committee has chosen to interview, at most, 10% of all new appointments and in practice the committee’s primary function is to detect patronage appointments.⁴⁴ Standing Committee scrutiny revealed that patronage remains a significant influence in Ontario but that Committee members are willing to tolerate patronage as long as the person appointed also has the qualifications required for the position.⁴⁵ The public announcement of new appointees (along with a sketch of their qualifications) and standing committee review are two important mechanisms that help ensure that the Ontario process is accountable.

3. Summary

The Ontario public appointments regime is open and accountable. While the government has made an important commitment to appointing the most qualified candidates, legislation in Ontario has been amended recently to lower qualification levels rather than raise them for some adjudicative boards. Its processes could be more transparent as to criteria used, the nature of the selection process (especially the degree of political staff involvement in this process) and the

⁴⁴ Pond, “Legislative Control” *supra* note 36. This figure is not surprising considering that the weekly lists of intended appointees often contain hundreds of names.

⁴⁵ *Ibid.*

form of the recommendation to the minister. In the absence of this information, it is difficult to assess the strength of the Ontario government's commitment to an appointments process that minimizes partisan considerations in favour of merit-based processes.⁴⁶

D. NEW BRUNSWICK

1. History of Reform

In 1999, in response to growing public concern over partisan appointments, the New Brunswick legislature established an all-party Select Committee to review appointments to key administrative boards. Its mandate was to "highly recommend, recommend, or not recommend" people whom the government proposed to appoint. The Select Committee had no authority to veto or to propose alternative names nor could it call nominees to appear and review qualifications. Given these limitations, the Select Committee could not function effectively and, within months, opposition members resigned over process issues. The Select Committee stopped meeting within a year. The Auditor General reviewed Crown agency governance practices in its 2003 report and made a number of recommendations regarding appointments to these agencies.⁴⁶ These recommendations included that Crown agency directors should be providing responsible departments with selection criteria for new appointments and that the selection of members should be primarily based on the demonstrated ability of a candidate to contribute to improved outcomes for the organization, and not their membership in a particular stakeholder or demographic group.⁴⁷

In 2004, the New Brunswick government formed the Commission on Legislative Democracy (the Commission) and one of its mandates was "to examine and make recommendations on enhancing transparency and accountability in appointments to government agencies, boards, and commissions."⁴⁸ In the New Brunswick Final Report, the Commission made a number of such recommendations and prepared a detailed policy framework for appointments. In particular, it recommended that:⁴⁹

- An ABC (Agencies, Boards and Commissions) Appointments Unit be established within the Office of Human Resources and assigned overall coordinating responsibility for appointments to government agencies, boards, and commissions.

⁴⁶ Office of the Auditor General of New Brunswick, *Chapter 6: Crown Agency Governance*, Report of the Auditor General (2003).

⁴⁷ The discussion in this paragraph draws on the review given in the [New Brunswick] Commission on Legislative Democracy, *Final Report and Recommendations*, (December 2004), online: <<http://www.gnb.ca/0100/FinalReport-e.pdf>> at 81-84 [New Brunswick Final Report].

⁴⁸ *Ibid.* at 84.

⁴⁹ *Ibid.* at 89 and 153-164.

- The unit be charged with setting out specific guidelines and processes for appointments to ABCs, appropriate to the nature of the ABC; monitoring and reporting on the appointment process to ensure that the guidelines are followed and appointments are made on an open, transparent and consistent basis; advertising vacancies on ABCs in a timely fashion; identifying, seeking and reviewing qualified candidates for appointment by the Lieutenant-Governor in Council; developing and maintaining a central databank of ABC appointments, vacancies and applications; providing human resource expertise and assistance in the process of reviewing applications for appointment; publicizing appointments; and co-ordinating the development and administration of training and orientation programs for ABC members on their roles and responsibilities.
- A formal process for appointments to the most significant ABCs be established to ensure merit-based appointments, and to give qualified and competent persons the opportunity to serve on these ABCs. Such a process would include the following steps: preparing a Board Profile defining the skills, experience, qualifications, and diversity of representation of members required for the effective operation of the ABC; developing position descriptions which set out the skills criteria for a vacancy on the ABC; advertising of vacancies and position descriptions; identification of potential candidates; formal vetting of applications and a due diligence check of candidates; preparing a short-list of qualified candidates with possible rank-ordering for decision by the Lieutenant-Governor in Council; advising unsuccessful candidates of the process outcome; and publishing appointments on government websites.
- Subject to the agreement of the political parties to such involvement, the Legislative Assembly be involved in the preparation and rank-ordering of a short-list of qualified candidates for the most significant ABCs.
- The appointment process facilitate the consideration of qualified people from regionally and culturally diverse backgrounds that are representative of the two official linguistic communities, women, aboriginal people, and minorities.

2. The New Appointments Policy

Shortly after the New Brunswick Final Report was completed, the New Brunswick government released a report titled “Changing the Way Appointments are Made”⁵⁰ and, by this report, adopted “An Appointment Policy for New Brunswick Agencies, Boards and Commissions” (the Appointments Policy). The Appointments Policy’s guiding principles include

⁵⁰ Government of New Brunswick, *Changing the Way Appointments are Made*, online: <<http://www.gnb.ca/0012/abc/PDF/ABCreport-e.pdf>>.

that appointments should be transparent (information on appointments should be made available in a timely way to the public); open (well-advertised on a web link on the government website); diverse (inclusive of women, members of First Nations and linguistic minorities, people with disabilities and residents from all regions of the province); and merit-based (to ensure the selection of “the most competent individuals”).

The Appointments Policy follows some of the Commission’s recommendations. For example, the guiding principles strongly echo the Commission’s recommendations and the Appointments Policy requires information about all current opportunities (including position descriptions, stated qualifications and information on how to apply) for board appointments be made widely known. The New Brunswick government website⁵¹ now has all this information and, in a pilot project, it also permits citizens to submit applications expressing a general interest in serving on an administrative agency.⁵² All candidates for a position, including those suggested by another for consideration, must make a formal application. The Appointments Policy provides that all appointments (including qualifications and remuneration) are to be announced on the same website. Boards are charged with ensuring that departmental staff are notified well in advance of position vacancies and departmental staff is then responsible for ensuring that this information is entered on a database maintained in the Executive Council Office. This requirement should ensure that there is time for the application process to be respected (especially the advertising requirements) while ensuring that boards operate with full complements of members.

However, many of the Commission’s recommendations that would help ensure that merit not partisanship is the primary consideration were not followed or were significantly modified. The Commission’s recommendation that an Appointments Unit be created in the Office of Human Resources and charged with establishing specific guidelines for appointments and monitoring the appointments process was not followed, nor was the recommendation that the Legislative Assembly have involvement in the process. Rather, the Executive Council Office is responsible for “monitoring all appointments” and the policy states that “Cabinet will also continue to play an active role in the ABC appointment process”. The Appointments Policy also states that the government must ensure “...that all individuals who are appointed...will be able to provide the most effective contribution to the strategic objectives outlined by the government”. The Appointments Policy goes so far as to say that:

Even the most independent ABC plays an instrumental role in helping to carry out the broader public policy objectives of the elected government. For that reason, the central government must take active steps to ensure that the leadership of its agencies, boards and commissions understands the part they are expected to play in supporting the government’s broader agenda.⁵³

⁵¹ Online: <<http://www.gnb.ca/0012/abc/PDF/ABCreport-e.pdf>>.

⁵² Executive Council Office, News Release, “Pilot project opens appointment process for agencies, boards and commissions” (2 July 2008), online: <<http://www.gnb.ca/cnb/news/ex/2008e0974ex.htm>>.

⁵³ *Supra* note 50.

The Commission had recommended that a selection committee be struck to consider the names of potential candidates for more significant boards and that this committee be made up of members from the Appointments Unit, the department and the board. Inherent in this recommendation is that no political staff would be involved in the selection committee process. Instead, the Appointments Policy identifies boards and senior management as having a critical role to play in the appointments process and states that "boards will be encouraged to prepare board position profiles and any other selection criteria" although departmental staff are, in the end, charged with developing position descriptions and qualifications. The Appointments Policy is vague on the selection process itself stating that the department "in consultation" with board representatives and government central agencies, will carry out a preliminary screening. It goes on to provide that "individuals who meet the criteria set out in the position description will be selected for further consideration" but says nothing about whether the board, the department or political staff will undertake this "further consideration". The Appointments Policy, by not identifying who must be involved in selection processes, leaves open the real possibility that the minister and political staff will continue to have significant influence on all aspects of the appointments process.

The minister is to receive a list of "possible candidates" (which is described in another paragraph as "qualified candidates") but the policy does not say anything about ranking or short listing candidates. The Commission had recommended that a "short list of qualified candidates, with a possible rank ordering" be prepared respecting more significant tribunals for ministerial consideration. Given that most positions have few, if any, statutory qualifications, an unranked list of all qualified candidates could be a long one.

The Commission had recommended publishing appointments on the government website and enhancing the role of the Legislative Assembly. Neither of these recommendations has been adopted in practice. While the new Appointments Policy states that the names, a short biographical sketch and remuneration of all appointees will be made available on the website, only the names of appointees are publicized. The Appointments Policy does not refer to legislative review and, while the select committee still seems to exist on paper, it has not been functional for almost 10 years.

3. Summary

The Appointments Policy adopted by the New Brunswick government states that its guiding principles are to ensure an open and transparent process and that appointments are diverse and merit-based ("the most competent individuals"). The process adopted in New Brunswick does allow for more openness and transparency about what positions are available and what qualifications are necessary, especially if the board's consultative role is properly used. Other than the opening statement on guiding principles, the Appointments Policy is silent on diversity considerations and speaks only of "qualified" or "possible" rather than "most competent" candidates. In summary, given the absence of detail on the selection process and the significant potential for political involvement at the screening stage and the absence of an express "most competent" short list or rank order requirement, there is still significant room in the New Brunswick process for political preferences to play a significant role in the

appointments process. The absence of effective accountability mechanisms exacerbates this potential.

E. ALBERTA

1. History of Reform

Since at least 1997 (and perhaps even earlier),⁵⁴ the Government of Alberta has expressly stated in policy directives that objective review processes should be in place to ensure that the “best qualified” people are appointed to government agency positions.⁵⁵ In 2005, the provincial Auditor General issued a report outlining key issues on recruitment and appointments to public sector boards of directors.⁵⁶ Following the Auditor General’s report, the Alberta government issued a directive requiring a competency based recruitment process for some significant administrative boards.⁵⁷ This policy was not consistently used across all administrative boards and its application was limited. In March 2007, Alberta premier Ed Stelmach, established a Board Governance Review Task Force “to make recommendations on improving the transparency, accountability and governance of Alberta’s agencies, boards and commissions”.⁵⁸

The Task Force reported in late 2007, and woven throughout all its recommendations, was the basic theme that agency appointments had to be non-partisan and competency-based and made using a transparent and open process. The Task Force also made a number of recommendations on rationalizing the need for administrative boards and on accountability and other good governance practices. It also asserted that board openings should be well advertised and that active recruitment should be undertaken to ensure that the diversity of Alberta’s population would be aware that they could apply for agency positions. Ensuring that Albertans should ‘see themselves’ when they deal with an agency would mean that the government would need to commit not only to an inclusive recruitment process but also make a commitment to a diverse board composition.

While recognizing that the minister is ultimately responsible for making appointments, the Task Force observed that the board itself should identify agency needs and have a primary

⁵⁴ Aucoin and Goodyear-Grant, *supra* note 1 at 321. These authors refer to the Alberta government’s reform of the appointments process in 1993 in response to a serious case of mal-administration by a Crown corporation but additional information about this policy could not be obtained.

⁵⁵ Nancy Averill, Nicole Murphy & Susan Snider, “Governor in Council Appointments: Best Practices and Recommendations for Reform” Public Policy Forum (February 2004) at 22.

⁵⁶ Auditor General Alberta, *Report on the Recruiting, Evaluating and Training Processes for Boards of Directors in the Alberta Public Sector*, (August 2005), online: <http://www.oag.ab.ca/files/oag/Recruiting_rpt.pdf>.

⁵⁷ Human Resources Directive, “Recruitment to Agencies, Boards and Commissions” as referenced in Neil McCrank, Linda Hohol & Allan Tupper, “At the Crossroads: The Report of the Board Governance Review Task Force” (October 2008), at 27, online: <http://www.alberta.ca/home/documents/At_a_Crossroads_-_screen.pdf>.

⁵⁸ McCrank *et al, ibid.* Appendix E “Terms of Reference” at 67.

role in reviewing and recommending candidates. It recognized that processes would need to be tailored to individual board circumstances since some boards, like corporate entities, would have different relationships with governments than others, like adjudicative boards. However, it recommended that every agency, and not the minister or the department, should develop a clear and public appointments process.

2. Governance Framework

Shortly after the report was released, the government announced that it would accept most of the Task Force's recommendations.⁵⁹ In February 2008, the government published the "Public Agencies Governance Framework"⁶⁰ wherein it gave effect to most of the Task Force's recommendations. It established the Agency Governance Secretariat (which is housed in the Executive Council) to manage the implementation of the Framework (which also incorporates governance issues) and support the ministries and agencies throughout the process. It did not follow the first recommendation, which was to pass legislation to institutionalize a governance framework, but rather simply used a non-legislative policy framework document.

According to the Framework, "transparent, non-partisan and competence-based [appointments] processes" will be used. The Alberta policy is unique among Canadian jurisdictions for its explicit reference to a "non-partisan" process; as noted earlier, no other policy refers to partisanship either to justify or criticize its continued use as an appointment criterion. All agency appointments processes include that individual openings must be publicly advertised. The "Job Opportunities" link on the government's home page takes users to a job search menu that links to all open "agency/board/commission" positions.⁶¹ The information containing position profiles attached to these links is comprehensive. Other guiding principles in the Framework include that a consistent process is used for all appointments to a particular agency, that the agency is involved in establishing needs, reviewing candidates and, that at a minimum, the chair or another board member be on the selection panel. As well, the Framework provides that recruitment and appointments processes must recognize the importance of diversity. In order to ensure a constant and on-going pool of qualified candidates, the government will promote the value of board membership, increase public awareness of opportunities and actively recruit candidates from across the province.

The Alberta policy states that:

⁵⁹ See: "Summary of Government Response", online: <http://alberta.ca/home/documents/Summary_of_government_response.pdf> and News Release, "Premier improves transparency of agencies, boards and commissions" (1 November 2007), online: <<http://www.alberta.ca/home/NewsFrame.cfm?ReleaseID=/acn/200711/22440FBA38FFF-EC75-915B-ED9FB808D86136F4.html>>.

⁶⁰ Government of Alberta, *Public Agencies Governance Framework*, February 2008, online: <http://www.alberta.ca/home/documents/Governance_Framework_web_version.pdf> [Framework].

⁶¹ Online: <<http://www.jobs.alberta.ca/JobSearch.htm>>.

... in some cases it may be appropriate for an agency to carry out these steps internally; in other instances the agency and the ministry may work together with human resource specialists; in other cases the recruitment process may be largely supported by the department.⁶²

It provides that the details of the screening process should be set out in agency documentation and recognizes that "in some instances, the process will be largely carried out by the agency. In others, the government will play a larger role."⁶³ Further, it provides that a recommendation will be submitted to the minister on the "top candidates" and "where possible, the recommendation should have several names, ideally between two and five for each vacancy".⁶⁴ The Alberta "top candidate" policy applies to all administrative boards, it is not limited, as in some jurisdictions, to just those described as significant or adjudicative. While the Framework contemplates that each agency will have an appointments process policy, these policies do not appear to be available online.

Finally, the Framework provides that all appointments must be publicly announced. However, recent appointments do not appear to be readily accessible (and may not be available) on the website. The names of current board members do not appear on many board websites.

As discussed earlier, the Task Force classified government agencies into five groups: regulatory/adjudicative boards; service delivery agencies; advisory bodies; public trusts; and corporate enterprises. This classification regime was accepted by the government in the governance Framework. One of the first tasks assigned to the Agency Governance Secretariat was completion of an Alberta Agency Inventory Database. As of December 2008, the Secretariat had identified more than 200 administrative boards that come within the governance Framework.⁶⁵ About 90 of these boards have primarily regulatory or adjudicative functions; 65 are advisory; 33 provide service delivery; 17 manage public trusts and only four direct corporate enterprises. It may be the thrust of the policy (although this is not expressly stated) that the boards with regulatory or adjudicative functions will have an appointments process that is more arm's length from government than advisory, service, public trust or corporate enterprises.⁶⁶ However, it could also be that the impacts of the classification regime are more likely to be felt on governance issues (such as strategic and business planning and economic forecasting) which are also dealt with in this policy. Obviously, governance issues are quite different for

⁶² *Ibid.* at 21.

⁶³ *Ibid.* at 22.

⁶⁴ *Ibid.* at 22.

⁶⁵ Agency Governance Secretariat Agency Inventory, online:
<http://www.alberta.ca/home/documents/Agency_Listing_Jan_09.pdf>.

⁶⁶ In Nova Scotia (for adjudicative boards and non-adjudicative boards) and British Columbia (for administrative boards and Crown agencies) different processes have been developed that seem to allow for little or no political involvement at the screening stage for the former boards but not for the later boards.

adjudicative boards than for boards of corporate enterprises. It is worth repeating that, at a minimum, the board chair or a current member is required to be a member of all selection panels and, regardless of the type of board, only a short list of “top candidates” is screened through to the minister.

3. Summary

The Alberta approach to board appointments is open and the clear thrust of the Framework policy is the expectation that all appointments regardless of the type of board will be transparent, non-partisan and merit-based. In particular, the Framework is designed to ensure that the job qualifications are set out and the posted position descriptions go beyond statutorily mandated qualifications and that the board chair plays a significant role in the appointments process. Importantly, a short list of only the “top candidates” is screened through for every appointment regardless of the function of the board. Having more information on successful applicants is necessary however to satisfy the expectation that the process is accountable.

F. YUKON

The home page for the Yukon government has a link labeled “Interested in sitting on a board or committee”.⁶⁷ The link takes users to the Executive Council Office website where there are listings for current openings, but there is no information connected to this link on the selection criteria for the position or the process that will be used to make the selection. There are further links to application forms, lists of current incumbents (names and term length only) and a Boards and Committees Directory (dated March 2006). The Directory briefly sets out legislative authority for each board, its function and membership requirements, the nature of the appointment, how often the board meets, remuneration and further contact information.

The Yukon Legislative Assembly has a Standing Committee on Appointments to Major Government Boards and Committees which is charged with reviewing nominations and recommending appointments to nine boards and any other appointments referred to it by the Executive Council.⁶⁸ The Committee meets in camera and there is little, if any, information available about how it operates other than the Assembly Rules.

The Yukon appointments process has some openness in the application process. In the absence of more information on selection criteria and the selection processes used, it cannot be determined whether it is transparent or merit-based. There are some accountability mechanisms such as the availability of board members’ names (but not qualifications) and standing committee review, but these are minimal especially since the Committee meets in camera.

⁶⁷ Government of Yukon home page: online: <<http://www.gov.yk.ca/>>.

⁶⁸ Standing Orders of the Yukon Legislative Assembly, ss. 45 (3.1)-(3.4), online: <<http://www.legassembly.gov.yk.ca/pdf/standing.pdf>>. The major boards include the Yukon Development Corporation Board of Directors, Yukon Energy, Utilities Board and Human Rights Commission.

G. PRINCE EDWARD ISLAND

In September 2007, the new Prince Edward Island government created the “Participate in PEI” policy. Its stated goal was to give all Prince Edward Island residents an equal chance at obtaining an appointment but it is unclear whether relative merit is to be the basis for appointments or whether simply meeting the bare statutory qualifications could be enough. The website and other information from the government does not reference merit but only speaks of opportunity to participate. Media accounts on the relative importance of merit and partisan considerations are conflicting. For example, one account suggests that partisanship will still play a role in appointments.⁶⁹ However in another story, a senior government policy advisor asserted that the goal of “Participate in PEI” is “to end patronage” and “to make the board as strong as possible.”⁷⁰

As its first step in the “Participate in PEI” policy, the government committed to having a website listing profiles for all tribunal and board appointments and to encourage people to submit letters of interest setting out which tribunals they might be interested in sitting on and their qualifications for appointments. The current “Participate in PEI” website⁷¹ has links to all administrative boards, lists current vacancies and encourages both general letters of interest in board appointments and applications for specific positions. It also has a list of all current appointees and includes information on matters such as when the current appointees’ terms expire and remuneration. The websites for specific boards set out little more than the statutory qualifications and duties.

The appointments process is managed by the Executive Council Office (ECO), but the website’s one-page flowchart on the decision making process provides that, while applications are received at the ECO, the “department reviews applications, consults stakeholders and forwards recommendations to the ECO.” While the appointments policy is not set out in any more detail than this, it appears that the department and not the political staff is responsible for the screening process. Under “Frequently Asked Questions”, the question, “Who makes the appointments?” is answered with “The names put forward [to Cabinet] for recommendation are the result of consultations with stakeholders, related Departments, (normally Directors and Deputy Ministers) and Executive Council. Often, and to varying degrees, portions or entire boards of ABCs are made based upon the specific recommendations of stakeholder organizations”.⁷²

⁶⁹ Wayne Thidodeau, “Participate in PEI means that any can apply to serve on provincial bodies” *The Guardian*, (1 September 2007), online: <<http://www.theguardian.pe.ca/index.cfm?sid=59029&sc=98>>.

⁷⁰ “Participate in PEI Defends Liberal Hirings” *CBC News*, (28 February 2008), online: <<http://www.cbc.ca/canada/prince-edward-island/story/2008/02/28/participate-patronage.html>>.

⁷¹ Online: <<http://www.gov.pe.ca/eco/participate.php3>>.

⁷² Online: <http://www.gov.pe.ca/eco/participate_pdfs/faq.pdf>.

The “Participate in PEI” process meets some of the requirements for a good board appointments regime. It is open and is somewhat transparent. Because the qualifications set out are little more than the statutory minimums and there is no requirement for board involvement in the process, it cannot be said that there is a strong merit focus or that the board’s needs have been taken into account. However, at least the department is responsible for screening so it is somewhat less likely to be swayed by partisanship. It would be useful if the website specifically referred to merit as the basis for appointments and the flowchart could be clearer on what information needs to be included in a “recommendation.” For example, does the recommendation include all qualified candidates or a ranked list of best qualified candidates? Names of successful appointees are publicly available although, as is the case with most administrative boards across Canada, little information about the appointees other than their name is made available. There are no other accountability mechanisms.

H. NORTHWEST TERRITORIES

Little information is available online about the appointments process currently used in the Northwest Territories. The Executive Council Submissions Handbook⁷³ has a document titled, “Appointments Procedures (GNWT Committees, Boards and Councils)” but this document only sets out what information a nominator needs to include when making a nomination submission to Cabinet; it does not contain any information about how the nominee’s name came to be chosen.

In 2004, the Department of the Executive initiated a process to review all administrative boards in the Northwest Territories.⁷⁴ In June 2005, a “Boards Policy” was adopted by the Executive Council and it provides that comprehensive governance frameworks (including appointments processes) should be developed for all boards, but the policy has no details.⁷⁵ Executive Council, together with the Standing Committee on Accountability and Oversight, then established a working group on the “Joint Board and Agencies Review Initiative”. According to budget documents, “the full implementation of this policy will significantly change the mandates/operations of existing boards, as it will establish a governance framework for board operations, provide criteria for board classification and a process for creating new boards.”⁷⁶

⁷³ Government of Northwest Territories, Cabinet Secretariat, Department of the Executive, *Executive Council Submissions Handbook (2007)*, Appendix 8, online: <[http://www.gov.nt.ca/research/publications/pdfs/ECouncilS%20Handbook%20\(April%202009\)%20\(final%20version\).pdf](http://www.gov.nt.ca/research/publications/pdfs/ECouncilS%20Handbook%20(April%202009)%20(final%20version).pdf)>.

⁷⁴ Government of Northwest Territories, *Performance and Accountability Report 2004-2005*, online: <www.fin.gov.nt.ca/documents/budgetdocuments/results/2004-05results.pdf>.

⁷⁵ Boards Policy, (23 June 2005), online: <http://www.gov.nt.ca/publications/policies/executive/Boards_Policy.pdf>.

⁷⁶ Standing Committee on Accountability and Oversight, *Report on the 2007-2008 Pre-Budget Review Process* at 2. In 2007-2008, the Committee was granted \$300,000 to continue its work. Northwest Territories Hansard, 15th Assembly, 5th Session, Day 24 at 762, online: <www.assembly.gov.nt.ca/_live/documents/documentManagerUpload/HN070209.pdf> at 762.

However, it appears that this review process is ongoing as the governance frameworks have not been published.

I. SASKATCHEWAN

In 2007, the Ombudsman for Saskatchewan issued a report on how to ensure that administrative decisions were made in a timely way.⁷⁷ While there are over 300 boards, commissions and agencies in Saskatchewan, this report considered 55 boards that were identified as having regulatory or adjudicative functions and focused on six boards that the Ombudsman determined were a representative cross section of the various roles and functions of adjudicative and regulatory boards. The report makes wide ranging recommendations on how to ensure the better functioning of administrative boards and therefore improve the likelihood of timely decision making. Without commenting in any detail on the current appointments regime, the report states that the appointment of qualified board members is “critical to the effective functioning of the system including timely decisions”, because it would “yield members who will quickly be able to render high quality and timely decisions”.⁷⁸ It recommended that the government consult further with boards on how to implement a merit-based appointment system that includes a selection panel, a job description and an open competition. The Saskatchewan government has not made any public response to these recommendations.

A review of the Saskatchewan government’s website reveals very little information about the board appointments process. The Executive Council Office published a procedures manual in 2004 which includes the nomination form that must be used to transmit the names of nominees to Cabinet for consideration but this document does not have any references to how the nominees are chosen.⁷⁹ Detailed searches reveal no general information on application or selection processes such as an appointments policy or framework; no advertised openings for specific positions (other than for regional health authorities); and almost no announcements of appointments. Most board websites do not give any information on board members’ qualifications and at least half of the websites do not even give the names of board members. There is one reference, under the Office of the Deputy Minister to the Premier, stating that this office is responsible for the co-ordination of the “appointments of senior executives for ministries and certain agencies”⁸⁰ and a few references to the “Crown and Central Agency

⁷⁷ Ombudsman Saskatchewan, “Hearing Back: Piecing Together Timeliness in Saskatchewan’s Administrative Tribunals” (December 2007), online: <<http://www.ombudsman.sk.ca/other-reports.html>>.

⁷⁸ *Ibid.* at 25.

⁷⁹ Executive Government Processes and Procedures in Saskatchewan: *A Procedures Manual, Nominations Form* (Appendix H), online: <<http://www.gov.sk.ca/adx/aspx/adxGetMedia.aspx?DocID=635,617,534,206,Documents&MediaID=752&Filename=2004Manual.pdf>>.

⁸⁰ Online: <<http://www.gov.sk.ca/executive-council/deputy-minister>>.

Committee.”⁸¹ But no information is available online about what these offices actually do, including whether they even have a role to play in board appointments. In 1997, a bill was introduced to create an Appointments Review Committee of the Legislative Assembly, but this bill did not become law.⁸²

Based on this review and the government’s failure to respond to the Ombudsman’s recommendations, it appears that the Saskatchewan appointments process, is not open or transparent, lacks accountability mechanisms, and does not actively endeavour to appoint the most qualified people to administrative boards.

J. NEWFOUNDLAND AND LABRADOR

A thorough review of the Newfoundland and Labrador government website yielded results similar to those found in Saskatchewan: it appears that there are no legislative provisions or policy frameworks on general issues related to board appointments; no information is available on vacant positions (and therefore no information is available on the processes that will be used to fill these positions); and very little information is available on who has been appointed. Most board appointments are by Order in Council and the governing legislation says little about requisite qualifications for appointees. The *Transparency and Accountability Act*⁸³ was passed in 2004 and provides that all affected bodies would fully comply with the legislation by 2008. It applies to 155 public bodies, including regulatory and adjudicative boards. It deals with board obligations to produce strategic, business and activity plans and economic and fiscal forecasts and updates, but it is silent on the appointments process. The Transparency and Accountability Office, which is under the Cabinet Secretariat, is expressly charged with assisting boards with governance issues but there is no reference to appointments in its online mandate.⁸⁴

It can be concluded that the Newfoundland and Labrador appointments process, like the Saskatchewan process, lacks openness, transparency, accountability mechanisms and is not designed to ensure that the most qualified people are appointed to administrative boards.

K. NUNAVUT

There is no information on the Government of Nunavut website concerning the processes used to make appointments to administrative boards other than the legislation creating the boards

⁸¹ Online: <<http://www.gov.sk.ca/adx/aspx/adxGetMedia.aspx?DocID=1591,1579,617,534,206,Documents&MediaID=2178&Filename=MandateLetter-MinCheveldayoff.pdf>>.

⁸² Bill 232 Of 1997, *An Act to amend The Legislative Assembly and Executive Council Act* (Appointments Review Committee/”ARC”), online: <<http://www.qp.gov.sk.ca/documents/english/opposition/1997/bill-232.pdf>>.

⁸³ S.N.L. 2004, c. T-8.1.

⁸⁴ Online: <<http://www.exec.gov.nl.ca/exec/cabinet/transacc/>>.

which provides that appointments are made by the Executive Council. There are announcements concerning the appointment of independent officers such as the Language Commissioner and the Integrity Commissioner and these processes are managed by the Legislative Assembly Management and Services Board. Most boards do not have websites and there is no information on required or desirable qualifications other than the minimal qualifications as set out in the statutes creating such boards. A Crown Agencies Council has been created to provide assistance with financial management but this body does not provide assistance in the appointments process.

L. MANITOBA

In a presentation at the 2008 Manitoba Council of Administrative Tribunals Conference,⁸⁵ the appointments process in Manitoba was described. At this conference it was stated that an Appointments to Boards Committee meets about once every six weeks and recommends appointees to the minister and, if the position requires an Order-in Council, the minister then makes recommendations to Cabinet. It was further indicated that this committee has three full time staff, maintains 3000 resumes on file as well as details of all boards and that it tries to ensure that the members represent the diversity of the Manitoba population.⁸⁶

Unlike many governments in Canada, the Manitoba government has not issued any general policy frameworks or directives concerning appointments. There is almost no publicly available information on the government website or elsewhere about the board appointments process used in Manitoba either for specific positions or more generally. Most Canadian jurisdictions post all board vacancies on a central website. The City of Winnipeg posts a document setting out all upcoming "citizen appointments" to civic boards and commissions.⁸⁷ A person interested in applying for a board appointment in Manitoba would be hard pressed to find out what positions might be open, the qualifications required for the position, a description of the position, remuneration, or the time lines and processes that will be used in making the selection.

Some Manitoba legislation calls for appointees reflective of certain constituencies and requires that affected groups be consulted about appointments. For example, legislation governing the Workers' Compensation Board and the Manitoba Labour Board requires consultation with labour and management representatives and the practice has developed that each constituency puts forward names of candidates and these candidates are accepted by the minister and Cabinet. But this is not the process used for the vast majority of Manitoba boards.

⁸⁵ Becky Barrett, (Presentation at the Manitoba Council of Administrative Tribunals 3rd Annual Conference, Winnipeg, April 2008). Ms. Barrett is a former Minister of Labour, secretary to the "Appointments to Boards Committee" or "Agencies, Boards and Commissions Committee" (ABC Committee) from 1981-1988 and chair of the ABC Committee from 1999-2003.

⁸⁶ *Ibid.*

⁸⁷ "2009 Citizen Appointments to Boards and Commissions: Information and Application Forms", online: <<http://winnipeg.ca/clerks/pdfs/boards/2009BCBOOK.pdf>>.

Moreover, except to the extent that the process is required by statute, the government is not bound by such practices, no matter how well-established, and remains free to appoint board members in any fashion as long as the formal requirements of the legislation are met.⁸⁸

A recent report⁸⁹ on the regional health authority governing boards found that the process currently used to make appointments to the boards inhibits their effectiveness. It notes that the process does not ensure that boards have the proper mix of skills; selection criteria are minimal; appointments are made without consultation with either the board chair or the CEO; there is no succession planning; and there are no accountability mechanisms to hold either individual members or boards in general accountable to the region or the minister. This report recommended that the appointments process should be more consultative, rigorous and transparent. More specifically, it recommended that boards should have nominating committees, all candidates should be interviewed; minimum selection criteria should be established and posted, and that a nomination process should be developed. The report also recommended that board performance (collectively and individually) should be regularly evaluated.

Standing Committees of the Manitoba Legislature do not have the power to review appointments. Very few board appointments are publicly announced and, even on the boards' own websites, very little information is available about the qualifications of those who have been appointed to Manitoba boards. Often the names of panel members are not even made public. Other than the appointment of a first-time Fairness Commissioner and a few appointments to advisory panels, the Manitoba government did not issue any news releases announcing appointments to any administrative boards in 2008. Similarly, in 2009⁹⁰ the only government issued news releases respecting appointments to administrative boards were the announcements of the appointments of First Nations and Métis directors to the board of the Winnipeg Regional Health Authority and a few appointments to advisory groups.

The appointments processes used in Manitoba are unstructured, informal and are managed on an *ad hoc* basis. As a result, generally, they are known only to political insiders and often rely on informal or closed networking. There is no evidence that boards engage in collective or individual performance reviews. While the lack of transparency is justified based on cost, other much smaller jurisdictions are more transparent; the lack of transparency has both political costs (in terms of lost public confidence) and real costs (emerging from the failure to find and engage the best qualified candidates).

⁸⁸ See *CUPE v. Ontario (Minister of Labour)*, *supra* note 40 where the Court found that the statute was clear that the appointing power resided in the minister and was subject only to the express constraints in the legislation.

⁸⁹ Report of the Manitoba Regional Health Authority External Review Committee, "Health Best Practices" (February 2008), online: <<http://www.gov.mb.ca/health/rha/review.html>>. See also, Price Waterhouse Coopers, "Corporate Governance and Accountability in Manitoba Crown Corporations" (February 2002) at 38-41, on board recruitment and appointments best practices.

⁹⁰ A news release was issued in November 2009 announcing the appointment of a new chair to the Manitoba Public Insurance Corporation (a crown corporation). See <<http://www.gov.mb.ca/cgi-bin/press/release.pl>>.

The appointments process used in Manitoba lacks openness, transparency and accountability and, in the absence of clear and public process requirements, position descriptions and selection criteria, a non-partisan selection process and public announcements of appointments, the process cannot be confidently described as merit-based. Generally, the selection process is known only to those with political connections and managed solely by the Executive Council Office. As the qualifications of appointees are unknown, Manitoba has an appointments process that could arguably foster mediocrity, is ripe for abuse, and does little to foster perceptions of board expertise and independence.

M. CANADA

1. History of Federal Appointments

Patronage and partisan appointments have been significant issues in Canadian federal politics for almost three decades. In December 1984, then Prime Minister Brian Mulroney, established the Special Committee on Reform of the House of Commons and in 1985, this committee asserted that "the primary purpose of a nomination procedure is to seek the best possible people."⁹¹ In 1989, the Standing Orders of the House of Commons were amended to provide for committee review of all Order in Council appointees (which would include more than just board appointments). In practice, such review has been limited to less than 1 per cent of appointees.⁹² Other reforms were promised but never materialized.⁹³

In 1998, the Canadian Bar Association passed a resolution at its Mid-Winter meeting stating that the federal process for board appointments and reappointments was not open to public scrutiny, leaving the system open to charges of inappropriate appointments, and called for a transparent process made in accordance with publicly-stated criteria and open to public scrutiny.⁹⁴ A 2004 review of federal appointing practices found that the process used to make Governor in Council appointments varied considerably across organizations.⁹⁵ In particular, some boards had significant input in developing a list of candidates from which an appointee

⁹¹ Canada, House of Commons, Special Committee on the Reform of the House of Commons, *Third Report* (Ottawa: Queen's Printer, June 1985) (Chair: James A. McGrath) [McGrath Report]. However, following the McGrath Report and in subsequent governments, little changed in the board appointments process.

⁹² In Lydia Scratch, "Governor in Council Appointments: Recent Changes and Suggestions for Reform" Parliamentary Information and Research Service (17 May 2006), online: <<http://www.parl.gc.ca/information/library/PRBpubs/prb0621-e.htm>>, it is noted that from 1989-2004, only 62 meetings out of a total of 12,783 committee meetings concerned Governor in Council nominations or appointments. Pond, "Legislative Oversight", *supra* note 2 at 373 found that, on average, eight appointees were interviewed per year between 1989 and 2004 and in some years, no appointees were interviewed.

⁹³ Ponds, *Ibid.*

⁹⁴ Canadian Bar Association, "Appointment and Training of Administrative Tribunal Members" Resolution 98-03-M, passed March 8, 1998.

⁹⁵ Averill *et al* *supra* note 55 at 30.

would be selected but, for most boards, the minister and the Prime Minister's office maintained control of selection and appointment with little input from the board. In 2005, the President of the Treasury Board tabled a report stating that "boards of directors of Crown corporations would advise the government on appropriate selection criteria for chairs, as well as competency profiles and future needs for directors" and that while selection criteria would be made public, the government would have final determination over that criteria.⁹⁶ It is not clear whether this policy is still being followed by the current government.

2. The Public Appointments Commission

(a) The *Federal Accountability Act*

In the 2006 federal election campaign, government patronage was a significant issue and the Conservative party pledged to clean up political patronage, which it fulfilled with the *Federal Accountability Act*.⁹⁷ This Act, which was not a stand alone piece of legislation but rather an omnibus bill that amended other acts, established the Public Appointments Commission under the *Salaries Act*.⁹⁸ The Act provides that the Governor in Council may establish the Public Appointments Commission which would be charged, among other things, with overseeing, monitoring and reporting on the process for making appointments to federal boards and Crown

⁹⁶ Scratch *supra* note 92.

⁹⁷ S.C. 2006, c. 9 [*Federal Accountability Act*].

⁹⁸ Section 227 of the *Federal Accountability Act* provides that the *Salaries Act*, R.S.C. 1985 c. S-3 [*Salaries Act*] is amended by adding the following after section 1:

PUBLIC APPOINTMENTS COMMISSION

Functions of Commission

1.1 (1) The Governor in Council may establish a Public Appointments Commission, consisting of a chairperson and not more than four other members

- (a) to oversee, monitor, review and report on the selection process for appointments and reappointments by the Governor in Council to agencies, boards, commissions and Crown corporations, and to ensure that every such process is widely made public and conducted in a **fair, open and transparent manner and that the appointments are based on merit**; (emphasis added)
- (b) to evaluate and approve the selection processes proposed by ministers to fill vacancies and they are implemented as approved, giving special attention to any instances in which ministers make appointments that are inconsistent with the recommendations of appointment panels;
- (c) to develop and establish a code of practice for appointments by the Governor in Council and ministers that sets out the steps that are necessary for a fair, open and transparent appointment process, including requirements for appointments and criteria for appointments to be made fully public;
- (d) to audit appointment policies and practices in order to determine whether the code of practice is being observed;
- (e) to report publicly on compliance with the code of practice, in particular by providing an annual report to the Prime Minister to be transmitted to the Speaker of each House of Parliament for tabling and referral to the appropriate committee of that House for study;
- (f) to provide public education and training of public servants involved in appointment and reappointment processes regarding the code of practice; and
- (g) to perform any other function specified by the Governor in Council.

corporations and ensuring that the appointments “process is widely made public and conducted in a fair, open and transparent manner and that the appointments are based on merit”.⁹⁹

Within days of the first reading of the *Federal Accountability Act*, the government established the Public Appointments Commission by Order in Council, appointed three people to it and nominated a fourth person as the chair.¹⁰⁰ The federal government has not made any further announcements about appointments to the Public Appointments Commission and it is not functioning even though the *Federal Accountability Act* received Royal Assent in December 2006. It should be noted that the legislation establishing Public Appointments Commission, strictly construed, does not actually impose an obligation to use fair, open, transparent or merit based processes. The legislation is permissive and only provides that it “may” be established.

The 2008 Conservative election platform¹⁰¹ promised to continue to reform the appointments to federal agencies and Crown corporations; appoint a task force to find ways to eliminate 10 per cent of appointments; ensure that the “appointees to federal agencies... and Crown corporations reflect the diversity of Canada in language, gender, region, age and ethnicity”; and to make appointments to the Public Appointments Commission and ensure that it “gets up and running”.

(b) The Public Appointments Commission Secretariat

In April 2006, the government also established the Public Appointments Commission Secretariat (Secretariat) by Order in Council to support the Public Appointments Commission’s work. The Secretariat had no staff until November 2007 and since then, it has had a staff of two. It is housed in the Privy Council Office.¹⁰² Its planned spending for 2008-09 was just under \$1.2 million and its mandate is “to ensure fair and competency-based processes are in place for the recruitment and selection of qualified individuals for Governor in Council appointments across

⁹⁹ *Ibid.* section 1.1(1)(a).

¹⁰⁰ Gwyn Morgan was appointed as chair. The Standing Committee on Government Operations and Estimates called for committee review of Mr. Morgan’s appointment and passed a motion (6-5) finding that Mr. Morgan was “unsuitable” for the position because of comments he had made in a speech about immigrants and multiculturalism. The government declined to complete the appointment. The other three people who had been appointed to the commission resigned. According to media accounts, a few hours after the committee motion was passed, Prime Minister Harper announced that the Public Appointments Commission was a “non-starter”. See, for example, Juliet O’Neill, “Frustrated PM abruptly cancels public appointments commission” *Canwest News Service* (17 May 2006), online: <[¹⁰¹ Conservative Party of Canada, “The True North Strong and Free: Stephen Harper’s Plan for Canada” \(2008\) at 25, online: <<http://www.conservative.ca/media/20081007-Platform-e.pdf>>.](http://www.canada.com/topics/news/politics/story.html?id=ef7d26ff-a4a8-435c-a1f8-a06ab1101a30&k=57662/nblank_></p></div><div data-bbox=)

¹⁰² The role of the Privy Council Office is to provide non-partisan advice to the Prime Minister. See, Sharon L. Sutherland, “The Clerk of the Privy Council” in *Commission of Inquiry into the Sponsorship Program and Advertising Activities; Restoring Accountability* (Research Studies, Volume 3, Linkage: Responsibility and Accountabilities – RWGSC) (Ottawa: Canadian Government Publishing, 2006).

agencies, boards commissions and Crown corporations.”¹⁰³ While the *Federal Accountability Act* specifically refers to “appointments that are based on merit”, the specific language of merit does not appear in most subsequent government documents on the topic. Rather, there is only a reference to “qualified” appointees which given the low, often non-existent, formal qualifications set out in legislation, cannot be assumed to be the same as a merit-based standard and leaves the door wide open to partisan appointments. For example, according to the “2008-2009 Report on Plans and Priorities for the Public Appointments Commission Secretariat”, the Secretariat is currently:

... working on defining the principles and practices that will form the base of a future Code of Practice. This code would, when implemented, provide for greater consistency and transparency of the Governor in Council appointments processes and would help ensure that appointments are based on key principles. It would be flexible enough to allow appointments to be made in ways that reflect the wide variations in mandate and scope of agencies, boards and commissions and Crown corporations. The work requires research into Canadian and international best practices on public appointments procedures.¹⁰⁴

(c) Federal Immigration and Refugee Board

Little of the work done by the Secretariat has been made public so it is difficult to assess what impact, if any, the Secretariat is having on the appointments process. The only publicly available information on work by the Secretariat is its 2007 report on appointments to the troubled Immigration and Refugee Board (IRB).¹⁰⁵ This Secretariat report stated that the Minister of Citizenship and Immigration and the Governor in Council “because of their prerogative, have a direct and legitimate interest in both the appointments process and in the development of the lists of potential IRB Members which are provided for their consideration by the Chair”.¹⁰⁶ To ensure that the prerogative was properly exercised, the Secretariat’s recommendations included that the selection committee should be composed of three members

¹⁰³ Treasury Board of Canada Secretariat, <www.tbs-sct.gc.ca>.

¹⁰⁴ *Ibid.*

¹⁰⁵ Public Appointments Commission Secretariat, Report to the Minister of Citizenship and Immigration Canada, *Governor in Council Appointments Process—Immigration and Refugee Board of Canada*, (January 2007), online: <www.cic.gc.ca/ENGLISH/resources/publications/irb-process.asp>. The IRB is the largest federal board in Canada and has had a history of patronage appointments. The legislation does not set out qualifications, except to require that 10 per cent of appointees be lawyers. Notwithstanding the long learning curve required for these positions, IRB members are often not reappointed when governments change. In 2004, the IRB appointments process had been overhauled to give the chair, working with an independent advisory panel, authority over recommendations for appointments and reappointments.

¹⁰⁶ *Ibid.* at 10.

appointed by the minister and three appointed by the board chair with the chair presiding and that the minister should be provided with three names for consideration against each vacancy.¹⁰⁷

In July 2007, the Minister provided a report¹⁰⁸ setting out a new selection process which significantly strengthened the merit-based aspects of the process by setting out clear and specific competency and personal suitability requirements. The Secretariat's recommendation on the composition of the selection board was not followed. Rather, the board is made up of three persons jointly appointed by the minister and the IRB chair, three members appointed by the IRB chair alone and the IRB chair also chairs the board. All members are required "to affirm their impartiality in all aspects of the selection process". No mention is made of the Minister or Governor in Council's prerogative and there is no specific requirement that more names be submitted to the minister than there are qualified candidates.

A recent report from the Auditor General reveals that problems still remain with appointments to the IRB.¹⁰⁹ The result of failing to re-appoint experienced members (favoring new appointees instead) and failing to maintain a full roster of appointments, is an inventory of unresolved immigration and refugee cases that "has reached an exceptionally high level" because there simply are not enough IRB members to handle the case load.¹¹⁰ By September 2008 there were more than 50,000 unresolved cases. The Auditor General notes that the failure to make decisions on a timely basis has significant consequences for the claimant, the integrity of the immigration program and the public purse (since most claimants cannot work during this period).¹¹¹ There are few other sources of information on what has been happening at the federal level since 2006.

¹⁰⁷ *Ibid.* Opposition to the process recommended in the Secretariat report came from the IRB chair (who resigned over the proposed changes to the screening committee process) and various other organizations. For example, the Canadian Council for Refugees and the Ontario Bar Association (among others) expressed concern over the stability and integrity of the board and the "government's politicization of the appointments process". Also, opposition came from the Canadian Council for Refugees and the Ontario Bar Association, see, Press Release, "Groups Dismayed Over Politization of Appointments to the IRB" (27 February 2007), online: <<http://www.ccrweb.ca/eng/media/mediaroom.htm>>. See also: Press Release, "Canadian Bar Association Says Merit Must Govern Appointments to the IRB Selection Committee" (19 April 2008), online: <http://www.cba.org/CBA/news/2007_Releases/2007-04-19_irb.aspx> and Cristin Schmitz, "Bar condemns Conservatives' treatment of refugee board" *The Lawyer's Weekly*, (11 May 2007).

¹⁰⁸ Immigration and Refugee Board of Canada, *The Selection Process for Governor in Council Appointments to the Immigration and Refugee Board of Canada*, (apparent date July 2007), online: <<http://www.irb.gc.ca/eng/brdcom/empl/memcom/Pages/process>>. This report stated that "The revised selection process will strengthen the merit-based competency focus of GIC appointments to the IRB while increasing transparency and fairness".

¹⁰⁹ Office of the Auditor General of Canada, *Governor in Council Appointments Process, Chapter 2 in the Status Report of the Auditor General of Canada to the House of Commons* (2009) online: <http://www.oag-bvg.gc.ca/internet/English/parl_oag_200903_02_e_32289.html>.

¹¹⁰ *Ibid.*

¹¹¹ *Ibid.*

3. Governor in Council Appointments

The first page of the federal government's website¹¹² has a link to "GiC Appointments" [Governor in Council]. This link takes users to the Governor in Council website which is maintained by the Privy Council Office. This website advises that applications are accepted on an ongoing basis for the four largest federal boards but it only lists current opportunities for significant positions.¹¹³ Links regarding these opportunities contain information on qualifications and processes, some links being more informative than others. No other opportunities are listed on the website.

In October 2008, the Privy Council Office posted the "Governor in Council Appointments Guide" and the "GiC Appointments Process Overview" on its website. The 500 page Appointments Guide (which is in a non-interactive pdf format) describes most, perhaps all, Governor in Council appointments by department. Thus, it references about 200 federal boards. It also contains, for each potential board, the statutory appointments provisions; a list of the names of current appointees (but no other information); vacancies; and other relevant information such as term lengths, security of tenure, remuneration, whether appointments are full or part time; and anticipated changes to the status of the organization. However, unlike for example, the Nova Scotia website guide, the federal guide does not contain any information about the qualifications required for appointments other than those required by statute. This approach could also be contrasted with the clear and specific competency and personal suitability requirements set out in the IRB appointment guidelines. Unless such requirements are clearly articulated, it is difficult to ensure that appointments are merit-based and tied to the needs of the board. Neither the Appointments Guide nor the federal website contain general information on how a person interested in an apparent or upcoming vacancy could apply. There is no promise of open competitions. If the Appointments Guide is updated regularly it will enhance the openness of federal appointments but the federal regime cannot be described as open except for the four largest boards and some significant appointments.

4. Summary

The federal board appointments processes have become more open with the publication of the Appointments Guide and posting of at least some of the open positions on the government's website. However, an open competition process is not used for most board appointments, no specific qualifications are set out for positions and no general appointments process guidelines have been made publicly available. Therefore, it is difficult to assess whether

¹¹² Online: <<http://www.canada.gc.ca>>.

¹¹³ The four largest boards are the (1) CPP/Old Age Security: Review Panel; (2) Citizenship Commission; (3) Employment Insurance: Board of Review; and (4) the Immigration and Refugee Board. Online: <<http://www.appointments-nominations.gc.ca/lstAnns.asp?lang=eng#Ad29>> and <<http://www.appointments-nominations.gc.ca/prsnt.asp?page=gicgd&lang=eng>>.

merit rather than patronage or partisanship is the primary consideration for making appointments. Little information is available on the selection processes used for most federal boards. The position criteria set out in the Appointment Guide are very general and the selection process is, apparently, *ad hoc* for most positions with notable exceptions such as the IRB. It is unclear, for example, to what extent board chairs play a role and how, if at all, partisan influences are minimized in the screening process or whether only the names of best qualified or all qualified candidates are presented to the minister or Cabinet for consideration. Accountability has improved, as at least the names of all appointees are now available and the government seems to use press releases frequently to announce significant appointments. Parliamentary committees can still review appointments but this process has not worked well. The Public Appointments Secretariat has not been made functional and therefore the legislated promise of an agency “to oversee, monitor, review and report on the selection process...to ensure that every such process is widely made public and conducted in a fair, open and transparent manner and that the appointments are based on merit”¹¹⁴ has not been realized.

N. UNITED KINGDOM

The British government established the Commissioner of Public Appointments (CPA) of England and Wales in 1995 following recommendations made by the Committee on Standards in Public Life. Scotland and North Ireland also each have a CPA. The CPA is an independent commissioner supported by the Office of the Commissioner of Public Appointments.¹¹⁵ The Commissioner’s main functions are set out in The Public Appointments Order in Council 2002 (which revoked the 1995 and 1998 orders), and include regulating the public appointments process through establishing a *Code of Practice* and related guidelines; investigating complaints about appointments processes; monitoring compliance with the *Code of Practice*; and promoting fair selection procedures focusing on merit. The CPA does not have appointment making capacity and is not involved directly in any appointments process.

The *Code of Practice*, an 84 page document, sets out the framework to guide those responsible for making all public appointments through the process. The *Code of Practice* is mandatory, unless the department has obtained prior approval for an exception for a particular appointment, but it does recognize that, as a diverse range of appointments are made, there is the need for proportionality and flexibility. Seven principles underlie the *Code of Practice*.¹¹⁶

¹¹⁴ *Salaries Act* s.1.1(1)(a).

¹¹⁵ Online:< <http://www.publicappointmentscommissioner.org/>>. The Commissioner for Public Appointments is appointed by Order in Council and is independent of both the Government and the Civil Service.

¹¹⁶ The complete *Code of Practice* and the annual report are available, online: <<http://www.publicappointmentscommissioner.org/Publications/>>. A summary of the *Code of Practice* principles can be found at page 16 of the Commissioner of Public Appointments Annual Report.

Ministerial Responsibility: The ultimate responsibility for appointments is with Ministers. To ensure that ministers can perform this function, departments must agree on both process and criteria before the process begins, ensure that the agreed upon criteria are not changed during the process and ensure that all candidates presented for approval meet the criteria.

Merit: All public appointments should be governed by the overriding principle of selection based on merit, by the well-informed choice of individuals who, through their abilities, experience and qualities, match the need of the public body in question. Political affiliation should not be a criterion except in very limited circumstances.

Independent Scrutiny: No appointment will take place without first being scrutinized by an independent panel or by a group including membership independent of the department filling the post. The Office of the Commissioner of Public Appointments maintains a list of independent assessors or departments can recruit their own independent assessors.

Equal opportunities: Departments should sustain programs to deliver equal opportunities principles.

Probity: Board members of public bodies must be committed to the principles and values of public service and perform their duties with integrity. Candidates must be asked as early as possible in the process to disclose any potential conflicts of interest.

Openness and Transparency: The principles of open government must be applied to the appointments process; its working must be transparent and information must be provided about the appointments made. All stages of the process, including relevant conversations must be documented and the information readily available for audit.

Proportionality: The appointments procedures need to be subject to the principle of proportionality, that is they should be appropriate for the nature of the post and the size and weight of its responsibilities.

While the principles underlying the *Code of Practice* are quite similar to those underlying the British Columbia Appointments Guidelines, the British regime has even greater protections than that of any other Canadian appointments regime for ensuring that merit alone is the guiding criterion for all administrative board appointments. These protections include the express statement that political affiliation cannot be a criterion except in limited circumstances; the requirement of independent scrutiny of all appointments; a complaints process; and active oversight by the CPA of the process including a detailed annual report.

One unique requirement aimed at minimizing patronage appointments is the requirement that all applicants declare political activity in the previous five years using a standard form check-off box type question and, if they are a successful candidate, their answer to the question will be published with the announcement of the appointment. Check-off boxes include standing for office, acting as an agent or canvassing for a candidate and donating more than £1000 to a political party. Simple membership and participation in party events does not have to be

disclosed. Applicants are also required to disclose the party for which they undertook such activity. An applicant's answer is not seen by the selection panels although candidates may include such work in their application if it demonstrates relevant skills such as public speaking and committee work. The requirement that applicants declare significant political affiliation can help draw attention to potentially questionable individual appointments but, importantly, creates a much larger overall picture of the numbers and percentages of party affiliates who are successful applicants.

Each year an Auditor's Report¹¹⁷ is prepared that covers select departments (all departments should be audited on a three year cycle) and examines issues such as overall governance arrangements, sample appointments and resources devoted to the appointments process. The CPA's Annual Report also reviews emerging and unresolved issues and reports on complaints. For example, the 2007-2008 Annual Report¹¹⁸ voices concern with the low number of women and people with disabilities being appointed to boards and states that the reasons for these low numbers will be examined in the upcoming year. No appointments secretariat in Canada publishes an Annual Report or an Auditor's Report.

The British government's 2006 Green Paper, *The Governance of Britain*, proposed that the relevant Select Committee (comparable to standing committee process used by Canada and in most provinces) should scrutinize certain key public appointments before they are confirmed.¹¹⁹ The Commissioner of Public Appointments recognized in her report that this process might be a desirable democratic check in some circumstances, but expressed concerns that it might reduce the pool of willing candidates, politicize the process and take too much time to complete.¹²⁰ According to the Annual Report, discussion is still ongoing about which public appointments might be suitable for such scrutiny.

The British CPA regime is quite extraordinary having regard to the significant and often unique steps it takes to ensure that merit is the only consideration taken into account for all public appointments.

O. CONCLUSION

In those Canadian jurisdictions where improvements to the board appointments process have been endorsed, they have proceeded by way of policy directive rather than legislative reform (with the exception of British Columbia). While there have been actual improvements respecting openness in all the Canadian jurisdictions that have adopted changes to their appointments process, there are still many weaknesses respecting transparency (for example, in

¹¹⁷ The 2007 Audit Report Summary, online: <<https://www.publicappointmentscommissioner.org/web-resources/resources/a691eac1c51.pdf>>.

¹¹⁸ 2007-08 Annual Report, online: <www.publicappointmentscommissioner.org>.

¹¹⁹ Ministry of Justice (U.K.), *The Governance of Britain (Green Paper)* (2007).

¹²⁰ CPA, 2007-08 Annual Report, *supra* note 118.

Manitoba, Ontario, Yukon, Saskatchewan and Newfoundland and Labrador); respecting accountability (for example, in Manitoba, Nova Scotia, New Brunswick, Alberta, Saskatchewan and Newfoundland and Labrador); and respecting merit being an overriding consideration (for example, in Manitoba, Yukon, Prince Edward Island and Saskatchewan and Newfoundland and Labrador).

Ultimately, despite the ostensible commitment to improvements to the board appointments process, there is still much room for improvement in most Canadian jurisdictions. Through legislative reform, rather than only a policy commitment, the Government of Manitoba could ensure that administrative board appointments are open, transparent, accountable and based on merit. The following chapter will examine these elements more closely and make specific recommendations respecting legislative reform to the appointments process.

CHAPTER 5

ELEMENTS OF GOOD APPOINTMENTS POLICIES

A. OPENNESS AND TRANSPARENCY

All of the governments across Canada that have made changes to their appointments regimes have, at the very least, improved the openness of their system. A system can be said to be open if those interested in an appointment can find out easily about vacancies, the qualifications and remuneration are clearly set out at the application stage and qualified people are invited to apply for the positions secure in the knowledge that their application will be given fair consideration.

Having an open system is an essential requirement to a merit-based system and, in an internet age, openness can be achieved without incurring significant costs. This requirement is so important that it should be legislated rather than created only at an operational level.¹ As discussed, Canada only announces significant positions (such as some full time chairs) and openings on the four largest boards on its website,² but the application process for most federal boards cannot be described as public, open, fair or transparent. The other reformed jurisdictions require by policy or practice that all administrative board vacancies be announced on a central website (and sometimes on the board home page) along with some information about qualifications and the application process. Some provincial regimes require or suggest other forms of advertising such as newspaper advertisements or inserts in professional newsletters.

An issue related to openness is whether steps need to be taken to encourage members of historically under-represented groups to apply. Open advertising helps to level the application playing field. But if there is a serious commitment to ensuring that the diversity of Manitoba's population is reflected on administrative boards, deliberate, active outreach processes need to be used to overcome a variety of systemic obstacles facing qualified members of other groups historically under-represented such as Aboriginal peoples or persons with disabilities.³ Active outreach could include posting advertisements in locations that are known or will be readily

¹ See Chapter 4, notes 97-99, federal legislation charges the Public Appointments Commission with "ensur[ing] that every such process is widely made public and conducted in a fair, open and transparent manner". However, the current federal process does not meet this legislative requirement.

² See Chapter 4, note 113 and accompanying text for details and references.

³ Judith McCormack, "What We Talk About When We Talk About Merit (And Why It Isn't Enough)" (presented to The Future of Administrative Justice Symposium, Faculty of Law, University of Toronto, January 2008), online: <http://www.law.utoronto.ca/documents/conferences/adminjustice08_McCormack.pdf>. This may also include bilingual applicants.

available to members of under-represented groups.⁴ Potential candidates may be identified through stakeholders or interested parties, professional search consultants, directed invitation to apply, or through the minister responsible or other elected officials.⁵ The board, the department and the appointments secretariat need to work together to identify appropriate recruitment strategies.

In some Canadian jurisdictions (notably Prince Edward Island and Yukon), the only significant reform to the appointments process appears to be an opening up of the application process. However, as one commentator has noted, there is a danger inherent in an exclusive or even a significant focus on openness: it contributes to a culture of amateurism. Many of the job descriptions that appear on websites contain so few qualifications that one could believe that anyone with a “smattering of skill or experience and a little training or mentoring can be an adjudicator or regulator.”⁶ Rather than enhancing the merit-based focus which should be the real emphasis of an appointments reform process, openness without express and specific qualifications de-emphasizes the degree of skill, knowledge, judgment or experience actually required for a high functioning tribunal. Openness alone is not enough and, in the absence of detailed qualifications, may even be antithetical to ensuring that the best qualified people are appointed.

The Law Reform Commission of Nova Scotia observed that:

... the appointment process for agencies must also be designed to ensure that there is public confidence in the agency. The appointment process should be “transparent”, in that the criteria or qualifications for an appointment should be consistent with the purposes of the agency and should be publicly available. The process for identifying and selecting people for appointment should be equally transparent.⁷

Many of the reformed regimes are weak on transparency. In some jurisdictions the posted qualifications, as set out on their government websites', include only the minimally required statutory qualifications. As will be discussed in the next section, a merit-based regime requires that those responsible for selection decide, in advance, what the core and desirable qualifications for board membership are. A transparent system will make these qualifications as well as remuneration publicly known. It will also make available information on the decision

⁴ The Board Resourcing and Development Office, *Appointment Guidelines: Administrative Tribunals* (August 2001, revised May 2007), online: <<http://www.fin.gov.bc.ca/brdo/appoint/AdminTribGuid.pdf>>. These guidelines were suggested for general recruitment, but are relevant for diversity outreach processes.

⁵ *Ibid.*

⁶ Judith McCormack, *supra* note 3.

⁷ Law Reform Commission of Nova Scotia, *Final Report: Reform of the Administrative Justice System in Nova Scotia*, (January 1997) at 42.

making process that will be used.⁸ It is difficult to have confidence in a process if it is next to impossible to know in some detail what the process is. Many regimes satisfy the requirement of openness but, by failing to include information on detailed qualifications, remuneration and the decision-making process, fail to meet transparency requirements.

The British regime goes even further on openness by requiring that before an appointment can be made, an independent assessor must review the process used and affirm that the process requirements were met.⁹ Additionally, all departments are subject to an audit on a three year cycle and the Commissioner of Public Appointments can investigate complaints from individuals who believe they have been unfairly treated in an appointment competition.¹⁰ No Canadian jurisdiction has requirements anywhere close to approaching this level of openness

RECOMMENDATION 1

To ensure that administrative board appointments are open and transparent, the Manitoba government should:

- enact legislation requiring that a description of all appointments processes are widely made public and conducted in a fair, open, and transparent manner;
- require that all openings for appointments to administrative boards in Manitoba be advertised, at a minimum, on a central government website and on the board website. The advertisements should contain position descriptions, detailed information on the core and desirable qualifications, and the remuneration range. Where appropriate, other advertising media should also be used;
- require that the department and the appointments secretariat determine what active outreach should be made to solicit applications from those who are members of communities that have been historically under-represented on the board; and
- provide information on the government's website setting out, in detail, the selection process.

⁸ The Federal Immigration and Refugee Board guidelines as discussed in Chapter 4, note 108 and accompanying text, is an excellent example of a transparent process.

⁹ Online: <<http://www.publicappointmentscommissioner.org/>>.

¹⁰ *Ibid.*

B. ESTABLISHING MERIT-BASED CRITERIA

British Columbia is the only Canadian jurisdiction to have codified in statute the requirement that all administrative board appointments must be merit-based.¹¹ Federal legislation charges the Public Appointments Commission with the task of ensuring that “appointments are based on merit”,¹² which may, indirectly, codify a merit-based appointment requirement. As then-British Columbia Minister of Justice stated after the *Administrative Tribunals Act* was passed, “entrenching the requirement in legislation guarantees that this principle will be respected now and into the future”.¹³ The Society for Adjudicators and Regulators supports a legislated appointments process asserting that it would help attract and retain qualified candidates because they would have more confidence about a possible career in the administrative justice system.¹⁴

Most jurisdictions that have adopted a general appointments policy state that the purpose of the policy is to ensure that the best candidate is appointed and that the overriding principle of selection is merit. Surprisingly however, neither Prince Edward Island nor the Yukon expressly state that the appointments process is designed to get the best candidate. The Alberta policy states that the process will be “non-partisan” but no other Canadian policy expressly refers to partisanship either to assert its limitations or to justify its continued use in the appointments process. The British Code of Practice is unique in its specific assertion that “political affiliation should not be a criterion except in very limited circumstances”.

There are a number of solid reasons in favour of taking pro-active steps to ensure that members of historically marginalized and under-represented groups be appointed to administrative boards. These reasons include that something is askew when members of certain groups dominate appointments; those historically excluded might have something distinctive to contribute to the process and foster attitudinal change; and the administrative justice system will enjoy more public trust and confidence if it is reflective of the society it regulates or impacts.¹⁵

The appointments policies adopted in Alberta, British Columbia (for administrative tribunals) and New Brunswick expressly refer to the value of reflecting the diversity of the population serving on administrative boards. The 2008 federal Conservative election platform set out a previously-unstated commitment to ensuring that “appointees to federal agencies...and

¹¹ *Administrative Tribunals Act*, S.B.C. 2004, c. 45 [Administrative Tribunals Act].

¹² *Salaries Act*, R.S.C. 1985, c. S-3, s. 1.1(1)(a).

¹³ Geoff Plant, Attorney General of British Columbia, “Keynote Address”, Ninth Annual British Columbia Council of Administrative Tribunals, October 2004.

¹⁴ Society for Adjudicators and Regulators, online: <<http://www.soar.on.ca/soar-appoint.htm>>.

¹⁵ These reasons are adapted from the list of eight arguments in favour of ensuring diversity in judicial appointments as set out in Richard Devlin, Wayne MacKay & N. Kim, “Reducing the Democratic Deficit: Representation, Diversity and the Canadian Judiciary, or Towards a ‘Triple P’ Judiciary” (2000) 38 Alberta Law Review 734.

Crown corporations reflect the diversity of Canada in language, gender, region, age and ethnicity".¹⁶ To date, this platform has not been expressed in any formal policy adopted by the federal government.

However, as the British Columbia Appointments Guidelines for Governing Boards and other Public Sector Organizations notes, "the challenge is to make sure that token or unqualified appointments are not made simply for reasons of gender, culture or geography".¹⁷ The focus of the appointments process should remain on merit-based appointments, (while still providing sufficient allowance and discretion with the appointing authority to meet diversity interests and commitments).

Beyond the general statement of a commitment to diversity, it is not clear from available information what steps are being taken in any of these jurisdictions or others to ensure that diversity is a factor in tribunal appointments. It could simply be that recruitment efforts try to target under-represented groups so that their members are aware of opportunities. Additionally, those involved in recruitment could re-consider evaluation criteria to ensure that they are not exclusionary for reasons not directly related to merit.¹⁸ Another possibility (although no policy seems to go this far) is a commitment to affirmative action or equity in the sense that, where all other factors are equal, preference should be given to the appointment of someone from an under-represented community.

As noted earlier, almost no statutes creating administrative boards in Manitoba (and elsewhere in Canada) set out specific qualifications for board appointees and the set out qualifications are at a high level of generality such as a "lawyer" or a "medical doctor".¹⁹ While it is beyond the scope of this report to consider whether more specific qualifications ought to be set out in enabling legislation, such amendments would certainly increase the likelihood of merit-based appointments. However, given that current statutory criteria are not set out or are very general, comprehensive job descriptions, profiles of expectations and core competencies must be developed for all administrative boards as the first step of any appointments process if merit is to be the guiding principle in appointments. Clear selection criteria and position descriptions provide a bench mark against which all applicants are measured and therefore allow for a more impartial evaluation. Among the reformed jurisdictions, Nova Scotia, British Columbia, New Brunswick, Alberta and, for some administrative boards, Ontario and the federal government have developed and made publicly available selection criteria (and usually position descriptions) that are more detailed than the statutory minimums. Some jurisdictions (such as Prince Edward Island and, for most positions, the federal and Ontario governments), only set out the statutory requirements.

¹⁶ Neither First Nations status nor persons with disabilities are in this list.

¹⁷ Online: <http://www.lcs.gov.bc.ca/brdo/appoint/AdminTribGuide_101203.pdf>.

¹⁸ Nancy Averill, Nicole Murphy & Susan Snider, "Governor in Council Appointments: Best Practices and Recommendations for Reform" (February 2004), Public Policy Forum, online: <http://www.pppforum.ca/sites/default/files/gov_apt_reform.pdf>.

¹⁹ As per research study prepared in support of this report by Matthew Underwood. See Chapter 1, note 6 and accompanying text.

Government task forces (in British Columbia, Alberta and New Brunswick), independent government officers (such as the Saskatchewan Ombudsman and Auditors General for New Brunswick, Alberta and Canada) and many academics and civic organizations²⁰ all agree that the board, usually through the board chair, must have a key role in developing board profiles and core competencies. Yet, only British Columbia has created a statutory requirement for board involvement. The *Administrative Tribunals Act* provides that member appointments can only be made in "consultation with the chair". Very surprisingly, general appointments policy in only three jurisdictions (British Columbia, Alberta and New Brunswick) mandate board involvement in setting board profiles and core competencies although board chairs are involved on an *ad hoc* basis in Ontario and for some specific administrative boards at the federal level. Failure to codify (either in legislation or by policy) board involvement at this initial stage, compromises the appearance of, and real ability to make merit-based appointments. No one else is as well placed as the board chair to understand what board members require as core competencies and certainly a small secretariat housed within the Executive Council Office or another government department cannot be expected to have this expertise for 160 administrative boards. Participation by the board in setting profiles and competencies is essential to ensuring that the board's operational requirements are key considerations in the screening process and, ultimately, for the appointing authority.

1. Reappointments

Merit-based criteria also become a factor in the post appointments context. While the focus of this report is on the appointments process for new members of administrative boards, the reappointments process for existing board members is a relevant issue that deserves mention. It should be noted that there are other post appointment criteria that may relate to the issues discussed in this report, but are not the subject of the Commission's recommendations. For example, security of tenure is an essential component of adjudicative independence but is beyond the scope of this report.

As a general principle, it has been observed that "reappointment decisions should be linked to a tribunal's overall retention and succession strategies and be made in a timely and fair way. In addition, performance evaluations are relevant and essential and should be considered before reappointment decisions are made."²¹

²⁰ Peter Aucoin and Elisabeth Goodey-Grant, "Designing a Merit Based Process for Appointing Boards of ABCs: Lessons from the Nova Scotia Reform Experience" (2002) 45 Canadian Public Administration 301-327, Administrative Justice Working Group (AJWG), Submission to the Ontario Law Reform Commission on Research Priorities (March 2007), online:

<www.lawib.utoronto.ca/.../Administrative_Justice.../Law_Commission_%20AJWG_Submission_%20final_form_%20March_15_%202007...> and "Principles for Appointments to Adjudicators/Regulatory Tribunals", published by the Society of Ontario Adjudicators and Regulators, online: <<http://www.soar.on.ca/soar-appoint.htm>>.

²¹ Angela Weltz and Wendi J. Mackay, "Appointments: A Policy Framework for Administrative Tribunals: A Background Paper", Administrative Justice Project, (Ministry of the Attorney-General, Victoria, British Columbia, 2002), online: <<http://www.gov.bc.ca/ajo>>.

In most Canadian jurisdictions, including Manitoba, there is no central rule dealing with reappointments; reappointments are dealt with in an agency's enabling legislation, by Order in Council or by employment terms.²² Where the legislation is silent, reappointments (or renewals) are at the discretion of the appointing authority. Some jurisdictions have a somewhat more formal reappointment process. For example, in Ontario, reappointments are at the discretion of the Lieutenant Governor, and for members seeking a reappointment, consideration will be given to their performance and the needs of the agency.²³ In Great Britain, a first reappointment may be made subject to a satisfactory performance assessment, and a second reappointment (which is rare) may only be made if the individual board member is considered in an open and competitive process and is subject to the same requirements as their initial appointment.²⁴

It has been suggested that the only prerequisite for reappointment should be whether a board member continues to meet the agency's performance standards and that current board members should not be required to reapply for appointments "since in the recruitment process it will be important to be able to give assurances to prospective candidates that, if appointed, their reappointment will be dependant only on their continuing to meet the agency's performance standards."²⁵ The British Columbia Board Resourcing and Development Office Appointment Guidelines provide that reappointment of existing members are based upon satisfactory performance assessment by tribunal chairs and that exiting members should not be required to go through a full recruitment and selection process.²⁶ According to these Appointments Guidelines, the circumstances that are considered when deciding whether to recommend a reappointment include: the timing of the reappointment; the availability of other qualified candidates; the expertise of the incumbent; the ongoing workload of the tribunal; the costs and commitment required to carry out a formal recruitment process or to train new appointees; and that positions (new appointments or reappointments) be filled by candidates with the best qualifications to meet the tribunal's requirements.²⁷ Similar principles have been endorsed by other commentators who have gone further and recommended that a reappointments process be

²² *Ibid.* also see appendices, online: <http://www.gov.bc.ca/ajo/down/appt_paper_appendices_may_27.pdf>.

²³ *Ibid.*

²⁴ The Commissioner for Public Appointments' Code of Practice for Ministerial Appointments to Public Bodies, online: <<http://www.publicappointmentscommissioner.org/Publications/>>. Also see Angela Weltz and Wendi J. Mackay, appendices, *supra* note 22.

²⁵ Ontario Bar Association, Submission to the Office of the Premier, "Administrative Justice Initiatives Project Respecting Adjudicative Agencies Governance Legislative Framework", online: <http://www.oba.org/En/publicaffairs_en/PDF/OBA_Submission_Adjudicative_Agencies-01oct09.pdf>.

²⁶ The Board Resourcing and Development Office, *supra* note 4.

²⁷ *Ibid.*

established through legislation, which would help “attract and keep qualified and expert adjudicators, and would ensure that the process is open, fair and transparent”.²⁸

The Commission agrees that the reappointments process should be based upon the good performance of those board members seeking reappointments and the needs and operational requirements of individual boards, which should all be evaluated by board chairs. If the recommendations made in this report are implemented, the appointments process in Manitoba should be open, transparent and merit-based and it would not be necessary or even desirable to require a competitive recruitment and selection process for members seeking reappointments.

Term limits on reappointments have been implemented in some jurisdictions.²⁹ In Ontario, adjudicators may not serve in the same position for more than ten years (structured as an initial appointment of two years; a reappointment for a term of three years; and a second reappointment for a further term of five years).³⁰ In Quebec, legislation provides for a maximum of two renewals (each of five years), for a total fifteen year possible length of service.³¹ In the United Kingdom, a member of a public body may not serve continuously in the same office for a term longer than ten years, which may only be exceeded if a member is appointed as chair or vice-chair of that same body, or if the Commissioner for Public Appointments agrees that exceptional circumstances are present.³²

It has been suggested that the justifications supporting term limits will depend upon the circumstances of each board. For example, there may be circumstances where non-renewable terms may be desirable, such as a ready availability of individuals with appropriate qualifications; where extensive training or orientations are not required; or where a range of outcomes can be tolerated. In other circumstances, it may be desirable to limit the number of reappointments, such as when wider community participation is desirable. However, there may also be circumstances that support renewable terms without term limits, such as a shortage of

²⁸ Society of Ontario Adjudicators and Regulators (SOAR), online: <<https://soar.on.ca/docs/Principles%20for%20Appointments.pdf>>.

²⁹ In Manitoba, some statutes provide for term limits and others allow for unlimited reappointments. For example, *The Counsel on Post Secondary Education Act*, C.C.S.M. c. C235, s.5(3) states that: “Members of the council are eligible to serve no more than two consecutive terms.” In contrast, *The Workers Compensation Act*, C.C.S.M. c.W200, ss.60.2(2) and 60.2(2.1) state that: “The Chief Appeal Commissioner and each appeal commissioner are to be appointed for the term fixed in the order appointing them, which must not exceed five years or be less than two years. The Chief Appeal Commissioner and each appeal commissioner are eligible for reappointment.”

³⁰ Press Release, “McGuinty government moves to strengthen key agencies” (29 June 2006), online: <<http://www.mgs.gov.on.ca/en/News/053356.html>>. An appointment to a new position (such as chair or vice-chair) commences a fresh ten year term limit.

³¹ Angela Weltz and Wendi J. Mackay, appendices, *supra* note 22.

³² “The Commissioner for Public Appointments’ Code of Practice for Ministerial Appointments to Public Bodies”, (August 2009) online: <<https://www.publicappointmentscommissioner.org/web-resources/resources/29508538572.pdf>>.

qualified individuals; where extensive training or orientations are required; where a range of outcomes cannot be tolerated; or where legal or highly technical issues are involved.³³

In principle, the Commission is not opposed to term limits on reappointments, but its appropriateness will largely depend upon the nature of a board's function and the individual circumstances of each board. Accordingly, if term limits are determined to be appropriate for a specific agency, they should be dealt with in an agency's enabling legislation or by Order in Council, rather than standardized term limits being imposed across all administrative boards in Manitoba.

RECOMMENDATION 2

To ensure all administrative board appointments are based on merit, the Manitoba government should:

- enact legislation codifying the requirement that all adjudicative and regulatory board appointments must be merit-based. All appointments policies adopted in Manitoba should expressly state that the purpose of the policy is to ensure that the best candidate is appointed and the overriding principle of selection is merit;
- ensure that appointments reflect the diversity of Manitoba's population and that selection criteria, while retaining merit as the first order of consideration, are inclusive of women, First Nations, persons with disabilities, visible minority groups and residents from diverse regions of the province;
- ensure that comprehensive job descriptions, profiles of expectations and detailed core competencies are developed by each administrative board and approved by the minister and an appointments secretariat. This information should be publicly accessible at government and tribunal websites; and
- ensure that reappointments are based upon both the good performance of administrative board members seeking reappointment and the needs of individual administrative boards and that board chairs play a key role in the evaluation and assessment of these factors.

C. MINIMIZING PARTISAN INFLUENCES

Governments across Canada have a long history of using board appointments as a means of rewarding political loyalties (patronage) and ensuring that kindred spirits are in positions of authority (partisanship). Creating open competitions, enhancing the transparency of the processes used and defining position descriptions and core qualifications will move governments towards merit-based appointments. But such efforts will not dislodge entrenched patronage expectations

³³ Angela Weltz and Wendi J. Mackay, *supra* note 21.

or lead to a questioning of partisan outcomes unless governments also examine how decision-making structures perpetuate patronage and partisanship and take steps to change these structural arrangements. If the appointments process continues to be managed by political staff without input from the board at the screening stage and there is an expectation that an unranked list of all qualified candidates be presented to the appointing authority, implementation of the other recommendations in this report will have minimal impacts.

As noted earlier,³⁴ merit should be the overriding consideration for any appointment to an administrative board but especially to those boards with complex and technical decision making obligations or where independence is important. Care should be taken to eliminate, or at least, monitor (depending upon the type of board) the influence of partisan considerations during the process. The only criterion for appointment to adjudicative boards and some regulatory agencies should be to ensure that the best person available is appointed; the important individual rights related decisions and the fact that the government is often a party in these cases demand that excellence and impartiality be the guiding considerations. While a shared political philosophy may be an appropriate consideration for appointments to other types of boards, neither the need for accountability nor an implicit expectation that appointees will do the government's bidding are appropriate justifications for partisan considerations to influence appointments to adjudicative boards and some regulatory agencies. In contrast, where the board's function is to make policy and give advice pursuant to a general statutory mandate and the need for independence is not as significant, the government can be justified in appointing those who share their political philosophy. However, since *The Human Rights Code* prohibits discrimination based on political belief, affiliation or activity unless such a belief is an express bona fide qualification, the government needs to be clearer about when it believes that such affiliations are legitimate considerations.

A strong merit-based appointments policy will ensure that the processes used minimize political influences at the pre-recommendation stage. The first issue to be considered is where the appointments secretariat or office should be housed and how it should be staffed. If the success of administrative boards is measured by how well it interprets or gives effect to the policy goals and values of the government then the secretariat would be housed in the Executive Council Office. But, if the goal is to ensure appointments based on merit, not political accountability, a human resources or government services department would be used to shelter the appointments process from the politics of the day.³⁵ It has been suggested that in order "to reduce concerns about politicization of the appointment process and to increase transparency and accountability, the government should establish an independent advisory committee that will act as a central clearinghouse for appointment recommendations to the Prime Minister and responsible ministers."³⁶ The Commission on Legislative Democracy in New Brunswick recommended that the secretariat be established in the Office of Human Resources presumably

³⁴ See Chapter 2, Partisanship and the Appointments Process.

³⁵ Angela Weltz and Wendi J. Mackay, *supra* note 21 at 70-79.

³⁶ Averill, Murphy & Snider, *supra* note 18 at 6.

to ensure that the specific expertise of this office would ensure that the appointment focus stayed on merit.³⁷

Secretariats with the responsibility to manage or to provide advice and oversight in the appointments process have been established in most reformed jurisdictions. In Britain, the Commissioner of Public Appointments (CPA) is an independent office, much like the Auditors General and Privacy and Information Commissioners Offices in Canada. In British Columbia, Ontario and Canada the appointment secretariats are housed in the Ministry of Labour and Citizenship Services, the Ministry of Government Services and the Privy Council Offices respectively, but in all other jurisdictions, including the unreformed jurisdictions, they are housed in the highly politicized environment of the Executive Council Offices.

A centralized secretariat could provide services that range along a continuum from general oversight, to advice and management, to significant control over specific processes. In no Canadian jurisdiction does a centralized secretariat perform a comprehensive oversight function similar to that performed by the CPA in Britain. Unlike the CPA, no one publishes Annual Reports or Auditors' Reports, statistics are not kept on, for example, the numbers of women or racialized minorities who are appointed and there are no complaints processes. The enabling provisions for the federal Public Appointments Commission contemplate that it will "oversee, [and] monitor...appointments", "audit appointment policies and practices" and "report publicly...in particular by providing an annual report".³⁸ The Board Resourcing and Development Office (BRDO) in British Columbia does provide advice and some oversight in the management of the appointments process. Its role in the appointments process, for example, is to ensure that detailed position descriptions and qualifications are prepared and to help define roles for the board and the ministry. However, to ensure that those best able to evaluate merit do the work, the hands-on work devolves back to the department and the board with the BRDO having no direct role in setting qualifications or during the screening process for specific appointments. It does not publish an annual report nor does it appear to have an auditing function.

The [New Brunswick] Commission on Legislative Democracy³⁹ recommended a management and advice model. Specifically, it recommended that an Agencies, Boards and Commissions [ABC] Appointment Unit be created to establish guidelines for appointments for each board; monitor processes to make sure that the guidelines are followed; provide information on upcoming appointments and how to apply; advertise vacancies; seek out candidates; accept and acknowledge applications; provide resources and expertise to the boards and the minister/department for the reviewing process; and publicize appointments including biographical sketch, term and remuneration. Note that under this model, like the British Columbia model, the central office is not involved in the screening process except to facilitate the process administratively and to ensure consistency.

³⁷ [New Brunswick] Commission on Legislative Democracy, *Final Report and Recommendations*, (December 2004), online: <<http://www.gnb.ca/0100/FinalReport-e.pdf>>.

³⁸ *Salaries Act*, *supra* note 12, s. 1.1.

³⁹ [New Brunswick] Commission on Legislative Democracy, *supra* note 37, see Appendix I at 153-164.

In most other reformed jurisdictions the centralized secretariat appears to have more control over specific appointments processes, either because the process mandates this involvement or because there is no consistent selection process for many administrative boards and therefore the secretariat manages appointments processes in an *ad hoc* manner. This hands-on control over specific processes, coupled with the fact that most secretariats are housed in the Executive Council Office exacerbates the potential for partisan considerations to enter the process.

Most appointments policies are vague about who will be involved in the screening processes. Choice of screening committee members is key to ensuring that the process is non-partisan. As discussed earlier, the federal Immigration and Refugee Board (IRB) chair resigned in 2007 when the federal government proposed changing the screening committee process to give the minister more control of who was on the screening committee. The final IRB policy requires the screening committee to be made up of three people jointly agreed upon by the minister, three people appointed by the board and the board chair as committee chair. The Nova Scotia policy pays significant attention to this issue stating that the advisory committees for adjudicative positions must be non-partisan and sets out a process for determining how the committees will be chosen to further this objective. However, most policies are silent on this issue and some policies (for example, British Columbia, New Brunswick and Alberta) contemplate, but do not require, that the mix of board, departmental and ministerial appointees on the screening committee will vary but do not set out a principled approach to making the final selection. The New Brunswick policy expressly states that "Cabinet will play an active role in the ABC appointment process" suggesting, perhaps, significant political involvement at the screening committee stage. The more control the minister's office or a politicized appointments secretariat has over the screening process, the greater the potential for partisan considerations to enter in.

It seems obvious that the board chairs should be assigned a role on the screening committee not only because they are best placed to determine whether a candidate meets the specialized needs of a particular administrative board but also because, as governments (such as Alberta, Newfoundland and Labrador and British Columbia) have imposed significant accountability requirements on administrative boards, those boards should be able to ensure that they have the personnel to do the job. A third reason for mandated board involvement on the screening committee is that the chair's presence should act to minimize partisan considerations. A 2002 study prepared for the Manitoba government on appointments to the boards of crown corporations stated that "the Chair and the Board should have, at a minimum, an advisory role in the appointment process."⁴⁰

⁴⁰ PricewaterhouseCoopers, "Corporate Governance and Accountability in Manitoba Crown Corporations" (February 2002) 30 at 39.

Many commentators⁴¹ call for significant board involvement on the screening committee. The [Alberta] Board Governance Review Task Force recommended that in addition to having a primary role in identifying boards' needs, each board should also have a primary role in reviewing and recommending candidates.⁴² Others go so far as to state that "the most effective way to secure relative merit, and thus quality nominations for ABC boards, is to assign responsibility to each board for making its own nominations for the appointment of new board members."⁴³ It has also been asserted that there would need to be an audit system and a general statutory regime setting out qualifications so that the board itself does not turn into a self-perpetuating patronage machine.⁴⁴

Yet in spite of the benefits of board involvement on the screening committee, British Columbia is the only jurisdiction to require that the board chair be a member of all screening committees for appointments to that board. Some jurisdictions express a preference but not a requirement for board involvement, but many are silent on board involvement.

Another provision that can help ensure that screening committees only consider a candidate's merit is found in the Immigration and Refugee Board appointments guidelines. One of these guidelines, uniquely perhaps, states that "all members of the SAB [Selection Advisory Committee] will be required to affirm their impartiality in all aspects of the selection process."⁴⁵ Given historic concerns about the politicized nature of the appointments process such an affirmation may be a useful reminder to screening committee members about the task at hand.

Most appointments policies state that the objective is to appoint the best candidate. Some appointments policies operationalized this policy by requiring the screening committee to create a short list to rank the most qualified candidates.⁴⁶ What is surprising however, especially given

⁴¹ See Weltz and Mackay, *supra* note 21, Robert W. Macaulay, *Directions: Review of Ontario's Regulatory Agencies Report* (Toronto: Queen's Printer for Ontario, 1989); "Principles for Appointments to Adjudicators/Regulatory Tribunals", published by the Society of Ontario Adjudicators and Regulators, online: <<http://www.soar.on.ca/soar-appoint.htm>>; the Administrative Justice Working Group, "Recommendations to Improve the Appointments Process for Ontario's Non-Regulatory Tribunals" (February 2005) as quoted in Lorne Sossin, "The Uneasy Relationship between Independence and Appointments in Canadian Administrative Law" in Grant Huscroft and Michael Taggart (eds), *Inside Outside Canadian Administrative Law: Essays in Honour of David Mullan* (Toronto: University of Toronto, 2006); and the [New Brunswick] Commission on Legislative Democracy *supra* note 27.

⁴² Neil McCrank, Linda Hohol, Allan Tupper, "At the Crossroads: The Report of the Board Governance Review Task Force" (October 2008), at 11, online: <http://www.alberta.ca/home/documents/At_a_Crossroads_screen.pdf> at 28.

⁴³ Aucoin and Goodyear-Grant *supra* note 20 at 319.

⁴⁴ *Ibid.*

⁴⁵ Online: <http://www.irb-cisr.gc.ca/en/about/employment/members/process_e.htm>.

⁴⁶ More specifically, Nova Scotia requires a short list of the 3-6 most qualified candidates (for adjudicative boards); British Columbia requires "recommended candidates in a ranked short list with the number of names on the list being greater than the number of positions to be filled"; and Alberta requires that the names of the "top candidates" be screened through to the appointing authority.

the general commitment to appointing the best candidate, is that some policies (such as Nova Scotia for non-adjudicative boards and New Brunswick for all appointments) require that the names of all qualified candidates be screened through to the appointing authority. Other policies are silent or unclear on the appointing authorities' expectations. As noted earlier, the formal qualifications for many administrative boards are very general and therefore the list of minimally qualified candidates could include every applicant. Merit-based appointments processes that go no further than individual merit will not further the objective of appointing the best qualified candidates. Moreover, as the minister is not well-placed to assess the relative merit of candidates, especially a long list of candidates, the potential of partisan considerations to play a role in choosing among candidates is significant. An appointments policy that does not have an express relative merit (best qualified) short list requirement seriously undermines the objective of ensuring that the best candidate is appointed.

The appointments regime in Britain requires all candidates to disclose significant partisan activities such as running for office or making a donation of more than £1000 in the previous five years. This information is not disclosed to the screening committee but it will be disclosed when the appointment is announced. As well, the Commissioner of Public Appointments publishes statistics on the percentages of people with declared affiliations (as well as their affiliations) in her annual report. Both of these mechanisms facilitate public assessment, one on the individual level and the other on a more systemic level, of the degree of partisanship in the appointments process. Governments would be unwilling to make appointments solely based on patronage or partisan considerations, especially to adjudicative boards or boards requiring a high degree of expert knowledge, when they face this degree of public scrutiny.

RECOMMENDATION 3

To ensure that the overriding consideration for all administrative board appointments is merit and not patronage or partisan affiliation, the Manitoba government should:

- create an appointments secretariat charged with both general oversight and monitoring of the appointments process and giving advice and assistance to administrative boards and departments (but no active role in any particular process) and house this secretariat independently, or at least in the Department of Labour and Immigration;
- develop processes for determining the composition of the screening committee that ensure that the committee is made up of those people who are best placed to assess the merit of each application and, at a minimum, include the board chair as a member. All screening committee members should be required to affirm their impartiality in all aspects of the selection process;
- require that the screening committee prepare a short list in rank order of the most qualified candidates and forward only this list to the appointing authority; and

- require all candidates to declare recent, significant involvement in partisan politics such as running for office, managing a campaign or making a significant donation. This information will not be disclosed during the appointments process but will be publicly disclosed when the name of the successful appointee is announced. The central appointments secretariat should be responsible for compiling and publishing annual statistics on the numbers of appointees with declared affiliations and what those affiliations are.

D. ACCOUNTABILITY MECHANISMS

Many Canadian jurisdictions express a commitment at the level of principle to ensuring accountability in the appointments process. For example, the Kaiser Settlement in Nova Scotia expressly states that “the entire process must be able to be scrutinized by the public” and that the government must be “accountable to the public for its record of public appointments”⁴⁷ and the federal *Salaries Act*⁴⁸ requires the Public Appointments Commission to “oversee” and “to report publicly” on implementation of an appointments code of practice. Yet, at the level of implementation, most Canadian regimes contain weak accountability mechanisms both for individual appointments and, more generally, on the workings of appointments processes.

There is almost no information on administrative board websites about those who serve on boards in most Canadian jurisdictions, including Manitoba. Even the names of board members are unavailable for most Manitoba administrative boards although some high profile boards include short biographies on their members. However, some jurisdictions, such as British Columbia and Ontario, provide short biographies on everyone who has been recently appointed to a board and individual board websites contain this information for all appointees. Publicly available information that focuses on qualifications fosters public confidence in the merit of the appointment and setting out significant political involvement (as already recommended) could be a significant check on patronage. Providing such information about appointees would not violate their privacy rights if the information focuses on their qualifications for public appointment and only contains publicly disclosed information related to political affiliation, such as having run for office or having made a significant donation. A fundamental aspect of accountability is provision of this basic information on who gets appointed.

Some commentators have recommended vesting individual administrative boards with the responsibility for reporting on the progress of appointments reform in their annual reports. The result would be that “everyone would then be better positioned to provide oversight,

⁴⁷ In the Matter of The Human Rights Act of Nova Scotia and A Complaint of Discrimination Between H. Archibald Kaiser, the Executive Council of Nova Scotia and the Nova Scotia Human Rights Commission, “Terms of Settlement Agreement” (January 2002). [Kaiser Settlement]. See also: Government of Nova Scotia, News Release, “Settlement Agreement Approved in Political Affiliation Complaint”, (23 January 2002), online: <www.gov.ns.ca/news/details.asp?id=20020123004>.

⁴⁸ *Supra* note 12.

evaluate progress and, through comparison, to identify and promote best practices".⁴⁹ As already recommended by the Commission, a general appointments secretariat should be charged with general oversight and monitoring of the implementation of appointments policies. Its report should be publicly available. If the government is serious about ensuring that diversity is an aspect of its appointments policies, then requiring that such information be collected and publicized in the annual report, as it is in Britain, would further this objective. The central appointments secretariat should publish annual statistics on the numbers of appointees with declared affiliations and what those affiliations are. No Canadian jurisdiction currently expressly requires individual boards or centralized secretariats to make such reports, although federal legislation contemplates this role for the Public Appointments Secretariat.

A significant prod towards reform in Nova Scotia was the looming hearing into the Kaiser human rights complaint and the subsequent settlement. An opportunity for complaints to be made is an important accountability mechanism in the sense that it would call the province to account for its current appointments practices.

Some believe that legislative standing committees should have a significant role to play in monitoring the appointments process and others are more skeptical about whether this process would further the objective of ensuring that appointments are merit based.⁵⁰ Those in favour of the process note that it "is based on the premise that the prospect of negative publicity should deter the cabinet from indulging in more egregious patronage appointments."⁵¹ Most of the research in the last decade focusing on how to improve the appointments process in Canada has been silent on this issue.⁵² Such silence may indicate that the writers did not see this process as useful.

Legislative committee review is currently available in Nova Scotia, Ontario, Yukon, New Brunswick and at the federal level, but these committees exercise their review powers infrequently. The New Brunswick Committee has not met for a decade and "entire years have passed without a single review"⁵³ at the federal level. Because the volume and diversity of

⁴⁹ Averill *et al*, *supra* note 18 at 7.

⁵⁰ In Favour: David Pond, "Legislative Oversight of Political Patronage in Canada" (2008) 46 Commonwealth and Comparative Politics 365 at 372 [Pond, "Legislative Oversight"] and David Pond, "Legislative Control of Cabinet Appointments to the Public Service: A Canadian Case-Study in the Political Limits of Parliamentary Reform" (2008) 61 Parliamentary Affairs 52 [Pond, "Legislative Control"]; [New Brunswick] Commission *supra* note 37; Ministry of Justice (U.K.), *The Governance of Britain (Green Paper)* (2007); Averill *et al* *supra* note 18. Against: Aucoin and Goodey-Grant *supra* note 20. As noted in Chapter 4, a Bill to this effect failed in Saskatchewan in 1997, see Bill 232 of 1997, *An Act to amend The Legislative Assembly and Executive Council Act (Appointments Review Committee)"ARC"*.), online: <<http://www.qp.gov.sk.ca/documents/english/opposition/1997/bill-232.pdf>>.

⁵¹ Pond, *Legislative Oversight*, *ibid*. at 51.

⁵² For example, the Alberta Task Force, as per McCrank, *supra* note 42; Averill *et al*, *supra* note 18; Weltz and Mackay *supra* note 21, Administrative Justice Office, *On Balance: Guiding Principles for Administrative Justice Reform in British Columbia* (July 2002) at 13-16 [The White Paper], online: <http://www.gov.bc.ca/ajo/down/white_paper.pdf>.

⁵³ Pond, *Legislative Oversight* *supra* note 50 at 373.

appointments is significant, standing committees do not have the time or the expertise to review appointments. The proceedings of some committees, such as Yukon, are in camera so the use of this process as an accountability mechanism is limited. Research has shown that the other committees have not been successful even at determining whether patronage or partisanship may have been a factor in the appointment and the committees are hamstrung by the process from examining qualifications.⁵⁴ It has not stopped partisan appointments and it has been observed that government members of the standing committee sometimes call non-partisan appointees for a hearing just so that they can showcase the government's commitment to merit.⁵⁵ They may not, for example, have information in advance about the candidates' qualifications and there may be a 30 minute time limit on the hearing. Because the names of unsuccessful candidates are not presented to the committee, they are unable to determine the relative merit of various applicants. Moreover, if the government has a majority, the committees have reliably rubber stamped the appointments.⁵⁶

If both information on qualifications and any significant political affiliation are made public when an appointment is announced, it could be that a standing committee could be more focused in performing an oversight role as it would not have to spend its limited time fishing for information on political affiliation for every potential appointment either before or at the committee hearing. On the other hand, such a requirement still might not facilitate a merit review given the committees' lack of expertise and the partisan balance of the committee which will result in confirmation under a majority government. As well, committee review could, as noted by the British Commissioner of Public Appointments, reduce the pool of willing candidates, politicize the process and take too much time to complete.⁵⁷ Standing committee review should not be more comprehensive than other accountability mechanisms nor is it likely to add anything to make the appointments process more accountable than the other recommendations made in this report. Therefore it is not recommended.

RECOMMENDATION 4

To ensure that progress on the implementation and maintenance of a new appointments policy can be monitored, the Manitoba government should:

- publish the names of all successful candidates, along with a short biographical sketch and recent significant political affiliations on the appointments secretariat's website for 30 days after the appointment is announced. The appointee's name and biographical sketch should also appear on the administrative board's website and in their annual report; and

⁵⁴ *Ibid.*

⁵⁵ Pond, "Legislative Control" *supra* note 50 at 7-9.

⁵⁶ Pond, "Legislative Oversight" *supra* note 50 at 372.

⁵⁷ Commissioner of Public Appointments, 2007-08 Annual Report, online: <www.publicappointmentscommissioner.org>.

- require both individual administrative boards and the central appointments secretariat to report annually on the progress of appointment reform. These reports should include information on efforts to improve the appointments process, the diversification of board membership and, as already recommended, information on the numbers of appointees with declared affiliations and what those affiliations are.

CHAPTER 6

LIST OF RECOMMENDATIONS

1. To ensure that administrative board appointments are open and transparent, the Manitoba government should:
 - enact legislation requiring that a description of all appointments process are widely made public and conducted in a fair, open, and transparent manner;
 - require that all openings for appointments to administrative boards in Manitoba be advertised, at a minimum, on a central government website and on the board website. The advertisements should contain position descriptions, detailed information on the core and desirable qualifications, and the remuneration range. Where appropriate, other advertising media should also be used;
 - require that the department and the appointments secretariat determine what active outreach should be made to solicit applications from those who are members of communities that have been historically under-represented on the board; and
 - provide information on the government's website setting out, in detail, the selection process. (p. 62)
2. To ensure all administrative board appointments are based on merit, the Manitoba government should:
 - enact legislation codifying the requirement that all adjudicative and regulatory board appointments must be merit-based. All appointments policies adopted in Manitoba should expressly state that the purpose of the policy is to ensure that the best candidate is appointed and the overriding principle of selection is merit;
 - ensure that appointments reflect the diversity of Manitoba's population and that selection criteria, while retaining merit as the first order of consideration, are inclusive of women, First Nations, persons with disabilities, visible minority groups and residents from diverse regions of the province;
 - ensure that comprehensive job descriptions, profiles of expectations and detailed core competencies are developed by each administrative board and approved by the minister and an appointments secretariat. This information should be publicly accessible at government and tribunal websites; and
 - ensure that reappointments are based upon both the good performance of administrative board members seeking reappointment and the needs of individual administrative boards and that board chairs play a key role in the evaluation and assessment of these factors. (p. 68)

3. To ensure that the overriding consideration for all administrative board appointments is merit and not patronage or partisan affiliation, the Manitoba government should:
 - create an appointments secretariat charged with both general oversight and monitoring of the appointments process and giving advice and assistance to administrative boards and departments (but no active role in any particular process) and house this secretariat independently, or at least in the Department of Labour and Immigration;
 - develop processes for determining the composition of the screening committee that ensure that the committee is made up of those people who are best placed to assess the merit of each application and, at a minimum, include the board chair as a member. All screening committee members should be required to affirm their impartiality in all aspects of the selection process.
 - require that the screening committee prepare a short list in rank order of the most qualified candidates and forward only this list to the appointing authority; and
 - require all candidates to declare recent, significant involvement in partisan politics such as running for office, managing a campaign or making a significant donation. This information will not be disclosed during the appointments process but will be publicly disclosed when the name of the successful appointee is announced. The central appointments secretariat should be responsible for compiling and publishing annual statistics on the numbers of appointees with declared affiliations and what those affiliations are. (p. 73)
4. To ensure that progress on the implementation and maintenance of a new appointments policy can be monitored, the Manitoba government should:
 - publish the names of all successful candidates, along with a short biographical sketch and recent significant political affiliations on the appointments secretariat's website for 30 days after the appointment is announced. The appointee's name and biographical sketch should also appear on the administrative board's website and in their annual report; and
 - require both individual administrative boards and the central appointments secretariat to report annually on the progress of appointment reform. These reports should include information on efforts to improve the appointments process, the diversification of board membership and, as already recommended, information on the numbers of appointees with declared affiliations and what those affiliations are. (p. 76)

IMPROVING ADMINISTRATIVE JUSTICE IN MANITOBA: STARTING WITH THE APPOINTMENTS PROCESS

EXECUTIVE SUMMARY

A. INTRODUCTION

Manitoba has about 160 administrative agencies, boards and commissions (often referred to as “ABCs”) that operate outside the line departments of government. The government relies on administrative boards to regulate and adjudicate, to give advice, to administer substantial financial and other assets and to provide goods and services. Other administrative boards are appointed to take on roles that emerge as governments assume regulatory functions. In the last decade most Canadian provinces and the federal government have reviewed their board appointments processes and most have implemented changes to ensure that the processes are more open, transparent and accountable and less partisan and more merit-based. Manitoba is one of the few provinces not to have made some change to its appointments process. The first step towards ensuring quality performance of administrative boards in Manitoba is to examine the quality of the appointments process.

This report discusses the difficult issue of what role, if any, partisanship (in the sense of appointees’ known sympathies with the government’s political leanings) should play in the appointments process. This report outlines the formal mechanisms for making board appointments in Canadian common law jurisdictions and outlines the issues that arise with the less formal mechanisms. It examines how concerns with appointments have emerged in Canadian jurisdictions and how governments have changed their appointments processes in response to those concerns. This report describes publicly available information on the current appointments process in Manitoba, and reviews developments and reforms in appointments policies in Canada and other jurisdictions. The final part of this report examines more closely the elements of appointments policies and makes recommendations on a new appointments policy for Manitoba.

B. PARTISANSHIP AND THE APPOINTMENTS PROCESS

Many administrative boards are expected to operate independently from the government. Some agencies are established to separate from political interference decisions that should be based on sound professional or technical knowledge. Administrative boards are often established to ensure that the very high technical requirements of policy making in the regulated areas can be determined in an atmosphere of expertise, flexibility, adaptability and freedom from partisanship. However, partisanship, in the sense of known sympathies with the government’s political philosophy, will always play a role in board appointments processes. For example, some administrative boards are appointed to give expert advice to the government with an important aspect of their expertise being that the political philosophies of appointees are in line with those of the government.

The nature of the function performed by a board makes a difference in some appointments policies regarding the permissible influence of partisan considerations; policies across Canada differ significantly on their basic approach to this issue. In this report, the Commission suggests that merit should be the overriding consideration for any appointment to an administrative board, especially to those boards with complex and technical decision making obligations or where independence is important. For example, the primary criterion for appointment to adjudicative and some regulatory tribunals should be to ensure that the best person available is appointed, whereas a shared political philosophy may be an appropriate consideration for appointments to other types of boards such as those whose function is to make policy and give advice pursuant to a general statutory mandate. Ultimately, care should be taken to eliminate or, at least, monitor (depending on the type of board) the influence of partisan considerations during the process.

C. OVERVIEW OF FORMAL AND INFORMAL APPOINTMENTS MECHANISMS

The formal mechanism for exercising an appointment power is set out in the legislation creating the board. Four formal appointing mechanisms are used in Canadian jurisdictions: (1) Order in Council appointments; (2) ministerial appointments; (3) internal agency appointments; and (4) constituency based or party choice appointments. Most board appointments are either Order in Council or ministerial appointments and these appointments are the focus of this report. Other than setting out the formal mechanisms for making appointments, there are few statutory provisions in Manitoba or most other Canadian jurisdictions concerning the board appointments process. In most cases, Manitoba legislation does not set out process provisions and legislation rarely says anything about how positions will be advertised, what application or screening processes need to be used or what are the required qualifications or experience (and if it does, the qualifications are often very general).

In the absence of formal statutory requirements, informal policies have been used to generate lists of potential board appointees. Little is known by the general public about the informal mechanisms used to make appointment decisions, including what positions are available, the criteria for filling them, what processes are used to screen names through to ministers or Cabinet or who is appointed to positions.

D. BOARD APPOINTMENTS POLICIES IN OTHER JURISDICTIONS

Most governments that have engaged in an appointments policy review have accepted in principle that the new process must be open, transparent and accountable and that appointments must be merit-based rather than based on political affiliation. Yet there are differences in the approaches taken by these governments.

The Nova Scotia Appointments policy is open and transparent as all positions are advertised, job descriptions and qualifications are established and the process used to make determinations is known. The policy clearly states that the purpose of the process is to appoint the "best candidate". The adjudicative positions process is merit-based as qualifications are quite detailed and an advisory committee and short list of best qualified candidates are used. However

the process used for non-adjudicative positions is less well designed to achieve the objective of merit-based, non-partisan appointments as qualifications are not as detailed, the minister has more influence over the screening panel and a list of all qualified candidates is sent to the appointing authority. Accountability measures are weak as names and biographies of administrative board members are not publicly available, no agency is charged with a general oversight function and the legislative review committee rarely reviews decisions.

The British Columbia appointments regime is open and transparent, merit-based and accountable. More than any other Canadian appointing regime, British Columbia attempts to make the process less influenced by partisanship by requiring board chair involvement, establishing specific and objective qualifications that are more detailed than the minimal qualifications set out in legislation, housing the unit supporting appointment outside the Executive Council Office and using a ranked short list. Information about the successful applicants is publicly available and the Board Resourcing and Development Office provides general oversight of the appointments process. As well, British Columbia initiated major reforms to the appointments process by enacting the Administrative Tribunal Appointment and Administration Act and the Administrative Tribunals Act.

The Ontario public appointments regime is open and accountable. While the government has made an important commitment to appointing the most qualified candidates, legislation in Ontario has been amended recently to lower qualification levels rather than raise them for some adjudicative boards. Its processes could be more transparent as to criteria used, the nature of the selection process and the form of the recommendation to the minister. In the absence of this information, it is difficult to assess the strength of the Ontario government's commitment to an appointments process that minimizes partisan considerations in favour of merit-based processes.

The process adopted in New Brunswick does allow for more openness and transparency about what positions are available and what qualifications are necessary, especially if the board's consultative role is properly used. While the Appointments Policy's opening statement on guiding principles indicates that appointments are diverse and merit-based (meaning "the most competent individuals"), the Appointments Policy is silent on diversity considerations and speaks only of "qualified" or "possible" rather than "most competent" candidates. Given the absence of detail on the selection process and the significant potential for political involvement at the screening stage and the absence of an express "most competent" short list or rank order requirement, there is still significant room in the New Brunswick process for political preferences to play a significant role in the appointments process. The absence of effective accountability mechanisms exacerbates this potential.

The Alberta approach to board appointments is open and the clear thrust of the policy is the expectation that all appointments regardless of the type of board will be transparent, non-partisan and merit-based. In particular, the process is designed to ensure that the job qualifications are set out, that the posted position descriptions go beyond statutorily mandated qualifications and that the board chair plays a significant role in the appointments process. Importantly, a short list of only the "top candidates" is screened through for every appointment regardless of the function of the board. Having more information on successful applicants is necessary however to satisfy the expectation that the process is accountable.

The Yukon appointments process has some openness in the application process. In the absence of more information on selection criteria and the selection processes, it cannot be determined whether it is transparent or merit-based. There are some accountability mechanisms such as the availability of board members' names (but not qualifications) and standing committee review, but these are minimal especially since the Committee meets in camera.

The appointments process in Prince Edward Island meets some of the requirements for a good board appointments regime. It is open and is somewhat transparent. Because the qualifications set out are little more than the statutory minimums and there is no requirement for board involvement in the process, it cannot be said that there is a strong merit focus or that the board's needs have been taken into account. However, the department is responsible for screening so it is somewhat less likely to be swayed by partisanship.

Little information is publicly available concerning the appointments process in the Northwest Territories. In 2004, the Department of the Executive initiated a process to review all administrative boards in the Northwest Territories and in 2005 a new policy provided that a comprehensive governance framework should be developed for all boards; it appears that this review process is ongoing and the governance framework has not been published.

The appointments processes in Saskatchewan and Newfoundland and Labrador lack openness, transparency, accountability mechanisms and are not designed to ensure that the most qualified people are appointed to administrative boards. It appears that there are no legislative provisions or policy frameworks on general issues related to board appointments, no information is available on vacant positions (and therefore no information is available on the processes that will be used to fill these positions) and very little information is available on who has been appointed.

Little information is publicly available concerning the appointments process in Nunavut. There is no information on the Government of Nunavut website concerning the process used to make appointments to administrative boards other than the legislation creating the boards, which provides that appointments are made by the Executive Council. Most boards do not have websites and there is no information on required or desirable qualifications other than the minimal qualifications as set out in the enabling statutes.

Unlike many governments in Canada, no general policy framework or directive concerning appointments have been issued in Manitoba. There is almost no publicly available information on the government website or elsewhere about the board appointments process used in Manitoba either for specific positions or more generally. Standing Committees of the Manitoba Legislature do not have the power to review appointments. Very few board appointments are publicly announced and, even on the boards' own websites, very little information is available about the qualifications of those who have been appointed to Manitoba boards. Often the names of panel members are not even made public. The appointments process used in Manitoba lacks some openness, transparency and accountability and, in the absence of factors such as clear and public process requirements; position descriptions and selection criteria; a non-partisan selection process; and public announcements of appointments, the process cannot be confidently described as merit-based.

The appointments process to federal boards have become more open with the publication of a federal Appointments Guide and the posting of at least some of the open positions on the government's website. However, an open competition process is not used for most board appointments, no specific qualifications are set out for positions and no general appointments process guidelines have been made publicly available. Little information is available on the selection processes used for most federal boards. Therefore, it is difficult to assess whether merit rather than patronage or partisanship is the primary consideration for making appointments, whether partisan influences are minimized in the screening process or whether only the best qualified (in contrast to all qualified) candidates are presented to the minister or Cabinet for consideration. Accountability has improved, as at least the names of all appointees are available and the government seems to use press releases frequently to announce significant appointments.

The British government established the Commissioner of Public Appointments, an independent commission, whose office regulates the public appointments process, investigates complaints about appointments processes, monitors compliance with a *Code of Practice* and promotes fair selection procedures focused on merit. The British regime is quite extraordinary and takes unique steps to ensure that merit is the only consideration taken into account for all public appointments.

In those Canadian jurisdictions where improvements to the board appointments process have been made, they have proceeded by way of policy directive rather than legislative reform (with the notable exception of British Columbia). All of the governments across Canada that have made changes to their appointments regimes have improved the openness of their system. However, in most jurisdictions, there are still many weaknesses respecting transparency, accountability and with merit being an overriding consideration.

E. ELEMENTS OF GOOD APPOINTMENTS POLICIES

Having an open and transparent system is an essential requirement to a merit-based system. All of the governments across Canada that have made changes to their appointments regimes have, at the very least, improved the openness of their system. A system can be said to be open if those interested in an appointment can find out easily about vacancies, if the qualifications and remuneration are clearly set out at the application stage and if qualified people are invited to apply for the positions secure in the knowledge that their application will be given fair consideration (including the use of appropriate recruitment efforts to ensure that diversity is reflected on administrative boards). In an internet age, openness can be achieved without incurring significant costs. A transparent system will make the qualifications and remuneration for board membership publicly known. It will also make information available on the decision making process. Many of the reformed regimes are weak on transparency. In some jurisdictions the posted qualifications, as set out on their government websites', include only the minimally required statutory qualifications, whereas a transparent system should make the core and desirable qualifications, as well as remuneration, publicly known.

The Commission makes recommendations to ensure that administrative board appointments are open and transparent, such as requiring that a description of all appointments processes are widely made public and conducted in a fair, open and transparent manner; requiring that all openings for appointments are advertised, at a minimum, on a central government website; and requiring that advertisements contain detailed information respecting position descriptions, core and desirable qualifications, the remuneration range as well as the selection process. It is also recommended that active outreach should be made to solicit applications from those who are members of communities that have been historically under-represented on Manitoba boards.

A merit-based regime requires that the purpose of the appointments policy is to ensure that the best candidate is appointed and that the overriding principle of selection is merit. Those responsible for selection should decide, in advance, what the core and desirable qualifications for board membership are. Care should be taken to eliminate, or at least, monitor (depending upon the type of board) the influence of partisan considerations during the appointments process. The Commission makes recommendations to ensure that administrative board appointments are based on merit, such as the enactment of legislation requiring that all adjudicative and regulatory appointments be merit-based; that appointments reflect the diversity of Manitoba's population; and that comprehensive job descriptions, profiles of expectations and detailed core competencies be developed and be made publicly accessible on government and tribunal websites. The Commission also examines reappointments policies for existing board members and recommends that reappointments be based upon the good performance of board members and the needs of boards, and that board chairs play a key role in making those assessments. The Commission recognizes that there may be some circumstances where term limits are appropriate, but suggests this should be dealt with in an agency's enabling legislation or by Order in Counsel.

Creating open competitions, enhancing the transparency of the processes used and defining position descriptions and core qualifications will move governments towards merit-based appointments. However, to ensure that appointments are free from patronage and that partisan affiliation is minimized, this report examines how changes should be made to decision making structures. For example, if the appointments process continues to be managed by political staff without input from the board at the screening stage and there is an expectation that an unranked list of all qualified candidates be presented to the appointing authority, implementation of the other recommendations in this report will have minimal impacts. The Commission recommends that to ensure that the overriding consideration for all administrative board appointments is merit and not patronage or partisanship, the Government of Manitoba should: create a central appointments secretariat with both general oversight and monitoring of the appointments process, and house this body independently; develop processes for establishing screening committees to assess the merit of each application, and at a minimum, include the board chair as a member, and have all screening committee members affirm their impartiality in all aspects of the selection process; require that the screening committee prepare a short list in rank order of the most qualified candidates to be forwarded to the appointing authority; and require candidates to declare recent, significant involvement in partisan politics, which information will only be publicly disclosed when the name of the successful appointee is announced.

The Commission observes that most Canadian appointment regimes contain weak accountability mechanisms for individual appointments and, more generally, on the workings of appointments processes. The Commission recommends that to ensure that progress on the implementation and maintenance of a new appointments policy can be monitored, the Government of Manitoba should publish the names of successful candidates, along with a short biographical sketch on the websites of the central appointments secretariat and the individual administrative board. The Commission also recommends that administrative boards and the central appointment secretariat report annually on the progress of appointment reform, such as appointments process improvements and diversification of board membership.

AMÉLIORATION DE LA JUSTICE ADMINISTRATIVE AU MANITOBA, EN COMMENÇANT PAR LE PROCESSUS DE NOMINATION

RÉSUMÉ

F. INTRODUCTION

Le Manitoba compte quelque 160 organismes, conseils et commissions administratifs (souvent appelés les « OCC »), qui fonctionnent en dehors des ministères gouvernementaux responsables. Le gouvernement compte sur les conseils administratifs pour régir d'importants actifs, financiers et autres, et pour rendre des décisions, donner des conseils et assurer une gestion en ce qui les concerne, ainsi que pour fournir des biens et des services. D'autres conseils administratifs sont nommés pour jouer les différents rôles découlant du fait que les gouvernements assument des fonctions de réglementation. Au cours de la dernière décennie, la plupart des provinces canadiennes, ainsi que le gouvernement fédéral, ont examiné les processus de nomination au conseil et ont, pour la plupart, apporté des modifications visant à rendre le processus plus ouvert, plus transparent, plus responsable, moins partial et davantage fondé sur le mérite. La première étape pour assurer la qualité du rendement des conseils administratifs au Manitoba consiste à examiner la qualité du processus de nomination.

Le présent rapport aborde la question délicate du rôle que la partialité (au sens où la personne nommée a des préférences connues pour les tendances politiques du gouvernement) devrait jouer, le cas échéant, dans le processus de nomination. Il présente les mécanismes de nomination officiels utilisés dans les ressorts canadiens de *common law*, ainsi que les questions qui se posent par rapport aux mécanismes moins formels. On y voit comment les préoccupations en matière de nominations sont apparues dans les ressorts canadiens et comment les gouvernements ont modifié leurs processus de nomination pour y répondre. Le présent rapport décrit les renseignements qui sont accessibles au public en ce qui concerne le processus de nomination actuel du Manitoba et il examine l'évolution et les réformes qui caractérisent les politiques de nomination au Canada et dans d'autres ressorts. Dans sa dernière partie, le présent rapport offre un examen plus approfondi des éléments constitutifs des politiques de nomination, avec des recommandations visant à élaborer une nouvelle politique de nomination au Manitoba.

G. PARTIALITÉ ET PROCESSUS DE NOMINATION

Bon nombre de conseils administratifs doivent fonctionner de manière indépendante du gouvernement. Certains organismes sont constitués pour que les décisions soient prises à l'abri de toute ingérence politique active, en se fondant sur de solides connaissances professionnelles ou techniques. Les conseils administratifs sont souvent constitués pour s'assurer que les exigences techniques très élevées de l'élaboration des politiques dans les secteurs réglementés puissent être fixées dans un contexte d'expertise, de souplesse, d'adaptabilité et d'impartialité. Toutefois, la partialité, au sens où la personne nommée a des préférences marquées pour la

philosophie politique du gouvernement, jouera toujours un rôle dans le processus de nomination à un conseil administratif. Par exemple, certains conseils administratifs sont nommés pour donner des conseils éclairés au gouvernement. L'un des aspects importants de leur champ d'expertise est de s'assurer que les philosophies politiques des personnes nommées sont conformes à celles du gouvernement.

La nature des fonctions exercées par un conseil administratif influe sur certaines politiques de nomination, en ce qui concerne le caractère acceptable des considérations partisanes; on trouve des différences marquées, à travers le Canada, dans l'attitude fondamentale qui est adoptée sur cette question. Dans le présent rapport, la Commission laisse entendre que le mérite devrait être le premier élément à prendre en considération dans toute nomination à un conseil administratif, surtout pour les organismes qui sont chargés de prendre des décisions techniques complexes, ou dont le caractère indépendant est fondamental. Par exemple, le principal critère de nomination à un tribunal d'arbitrage et à certains tribunaux de réglementation devrait être de s'assurer que la personne la plus qualifiée soit nommée, alors qu'une philosophie politique commune pourrait être un élément approprié à prendre en considération dans la nomination à d'autres types de conseils administratifs, notamment ceux dont la fonction est d'élaborer des politiques et de donner des conseils, conformément à une habilitation légale générale. Enfin, il faudrait éliminer ou, du moins, surveiller (selon le type de conseil administratif) l'influence des considérations partisanes dans le processus de nomination.

H. APERÇU DES MÉCANISMES DE NOMINATION FORMELS ET INFORMELS

Le mécanisme formel permettant d'exercer un pouvoir de nomination est prévu dans la loi créant le conseil. Quatre mécanismes de nomination formels sont utilisés par les ressorts canadiens : (1) les nominations par décret; (2) les nominations ministérielles; (3) les nominations selon le processus interne de l'organisme; et (4) les nominations qui relèvent de la circonscription ou du choix d'un parti. La plupart des nominations au conseil sont des nominations par décret ou des nominations ministérielles, et ces types de nomination constituent le point central du présent rapport. À part l'exposé des mécanismes de nomination formels, il existe quelques dispositions législatives au Manitoba, ou dans la plupart des ressorts canadiens, en ce qui concerne le processus de nomination au conseil. Dans la plupart des cas, la législation manitobaine ne prévoit pas de dispositions sur le processus de nomination et il est rarement fait mention dans la loi de la manière dont les postes seront annoncés, des processus d'appel de candidatures ou de sélection qui doivent être utilisés ou des compétences ou de l'expérience requises (et, s'il est question des compétences, celles-ci sont souvent énoncées de manière très générale).

En l'absence d'exigences légales formelles, des politiques informelles ont été utilisées pour produire des listes de personnes pouvant éventuellement être nommées au conseil. Le grand public en sait très peu sur les mécanismes informels utilisés pour prendre des décisions en matière de nomination, y compris les postes qui sont offerts, les critères de dotation, les processus de présélection des candidats et d'acheminement des noms jusqu'aux ministres ou au conseil des ministres, ou pour retenir une candidature.

I. POLITIQUES DE NOMINATION AUX CONSEILS ADMINISTRATIFS DANS D'AUTRES RESSORTS

La plupart des gouvernements qui se sont livrés à un examen des politiques de nomination ont admis, en principe, que le nouveau processus devait être ouvert, transparent et responsable, et que les nominations devaient se fonder sur le mérite plutôt que sur l'affiliation politique. Toutefois, ces gouvernements adoptent différentes approches.

En Nouvelle-Écosse, la politique de nomination est ouverte et transparente; tous les postes sont annoncés, les descriptions de travail et les compétences sont justifiées et le processus décisionnel utilisé est connu. La politique pose clairement que le processus vise à nommer le meilleur candidat possible. Le processus visant à dorer les postes décisionnels est fondé sur le mérite, du fait que les compétences sont très détaillées, qu'un comité consultatif est présent et qu'une liste restreinte des candidats les plus qualifiés est utilisée. Toutefois, le processus qui sert à dorer les postes non décisionnels est moins bien conçu pour en arriver à avoir des nominations impartiales fondées sur le mérite; en effet, les compétences ne sont pas aussi détaillées, le ministre a une plus grande influence sur le comité de présélection et la liste de tous les candidats qualifiés est envoyée à l'autorité de nomination. Il y a peu de mesures de responsabilisation puisque les noms et biographies des membres du conseil administratif ne sont pas rendus publics, qu'aucun organisme n'a pour fonction d'exercer une surveillance générale et que le comité de révision de la législation examine rarement les décisions.

Le régime de nomination de la Colombie-Britannique est ouvert et transparent, fondé sur le mérite et responsable. Plus que tout autre régime de nomination canadien, celui de la Colombie-Britannique est fait de manière à rendre le processus plus impartial, en exigeant que le président du conseil prenne part à la nomination, en énonçant des compétences précises et objectives qui sont plus détaillées que les compétences minimales prévues dans la législation, en hébergeant l'unité qui appuie le processus de nomination à l'extérieur de l'Executive Council Office et en utilisant une liste restreinte ordonnée. Les renseignements sur les candidats retenus sont rendus publics, et le Board Resourcing and Development Office s'occupe de la surveillance générale du processus de nomination. De plus, la Colombie-Britannique a lancé un projet de réforme majeure du processus de nomination en promulguant la *Administrative Tribunal Appointment and Administration Act* et la *Administrative Tribunals Act*.

Le régime de nomination public de l'Ontario est ouvert et responsable. Bien que le gouvernement ait pris l'engagement important de nommer les candidats les plus qualifiés, la législation de l'Ontario a récemment été modifiée pour réduire les niveaux de compétence au lieu de les augmenter pour certains organismes d'arbitrage. Son processus de nomination pourrait être plus transparent en ce qui concerne les critères utilisés, la nature du processus de sélection et les recommandations formulées au ministre. En l'absence de ce type de renseignements, il est difficile d'évaluer la force de l'engagement du gouvernement de l'Ontario envers un processus de nomination qui réduit au minimum les considérations partisanes au profit d'un processus fondé sur le mérite.

Le processus adopté au Nouveau-Brunswick permet une plus grande ouverture et une plus grande transparence, du point de vue des postes offerts et des compétences nécessaires, surtout si le rôle consultatif du conseil est joué de manière appropriée. Bien que l'introduction de

la partie sur les principes directeurs de la *Politique de nomination aux organismes, conseils et commissions du Nouveau-Brunswick* laisse entendre que le processus de nomination est fondé sur la diversité et le mérite (ce qui signifie la sélection de la « personne la plus compétente »), la politique elle-même ne dit rien sur les questions de diversité et elle traite seulement des candidats « qualifiés » ou « possibles », et non pas des candidats « les plus compétents ». Étant donné l'absence de détails sur le processus de sélection, la possibilité marquée d'ingérence politique au niveau de la présélection et l'absence d'une liste restreinte expresse des candidats « les plus compétents », ou d'un classement par ordre, les opinions politiques peuvent jouer un rôle décisif dans le processus de nomination du Nouveau-Brunswick. L'absence de mécanismes de responsabilisation efficaces accentue encore cette possibilité.

L'Alberta préconise une approche ouverte pour ce qui est des nominations au conseil, et la politique vise nettement à ce que toutes les nominations, sans égard au type de conseil, se fassent de manière transparente, impartiale et fondée sur le mérite. Le processus de nomination est conçu pour garantir que les compétences liées à l'emploi sont énoncées, que les descriptions de travail affichées dépassent les compétences imposées par la loi et que le président du conseil ait un rôle important à jouer dans le processus de nomination. Fait important, on examine une liste restreinte des meilleurs candidats seulement, pour chaque nomination, quelle que soit la tâche du conseil. Toutefois, il faut obtenir davantage de renseignements sur les candidats qui sont retenus si l'on veut prouver le caractère responsable du processus.

Au Yukon, le processus de nomination manifeste une certaine ouverture pour ce qui est du processus d'appel de candidatures. En l'absence de plus de renseignements sur les critères de sélection et les processus de sélection utilisés, il est impossible d'établir si le processus est transparent ou fondé sur le mérite. Il existe certains mécanismes de responsabilisation, notamment la disponibilité du nom des membres du conseil (et non pas de leurs compétences) et de l'examen du comité permanent, mais ils sont d'importance moindre, surtout du fait que les réunions du comité se font à huis clos.

Le processus de nomination de l'Île-du-Prince-Édouard satisfait à certaines des exigences d'un bon régime de nomination au conseil : il est ouvert et assez transparent. Du fait que les compétences énoncées sont légèrement plus détaillées que le minimum prévu dans la loi et qu'il n'est pas nécessaire que le conseil administratif prenne part au processus, il est difficile de savoir si le processus est fortement fondé sur le mérite ou si les besoins du conseil administratif ont été pris en compte. Toutefois, le ministère est chargé de la présélection, de sorte que la nomination risque moins d'être impartiale.

Très peu d'information est mise à la disposition du public en ce qui concerne le processus de nomination des Territoires du Nord-Ouest. En 2004, le ministère de l'Exécutif a lancé un processus afin d'examiner les nominations à tous les conseils administratifs des Territoires du Nord-Ouest, et en 2005, une nouvelle politique prévoyait qu'un cadre de gouvernance détaillé devrait être élaboré pour l'ensemble des conseils administratifs. Il s'agit d'un processus d'examen continu, et le cadre de gouvernance n'a jamais été publié.

Les processus de nomination de la Saskatchewan et de Terre-Neuve-et-Labrador manquent d'ouverture, de transparence et de mécanismes de responsabilisation, en plus de ne pas

être conçus pour s'assurer que la personne la plus qualifiée est nommée au conseil administratif. Il semble qu'il n'y ait aucune disposition législative ni aucun cadre stratégique sur les questions d'intérêt général relatives aux nominations au conseil, qu'aucun renseignement ne soit disponible quant aux postes à pourvoir (et, par conséquent, rien sur les processus qui seront utilisés pour doter ces postes) et qu'il y ait très peu d'information sur le candidat retenu.

Au Nunavut, il n'y a pas beaucoup d'information qui soit publiée sur le processus de nomination. Le site Web du gouvernement du Nunavut ne comprend aucun renseignement sur le processus utilisé pour les nominations aux conseils administratifs, à l'exception de la loi créant les conseils, qui prévoit que les nominations sont faites par le conseil exécutif. La plupart des conseils administratifs n'ont pas de site Web, et aucun renseignement n'est fourni sur les compétences requises ou souhaitables, à l'exception des compétences minimales prévues dans les lois habilitantes.

À la différence de bon nombre de gouvernements au Canada, aucun cadre stratégique général ni aucune directive sur les nominations n'ont été publiés au Manitoba. Pratiquement aucun renseignement n'est rendu public sur le site Web du gouvernement, ou ailleurs, en ce qui concerne le processus de nomination aux conseils administratifs utilisé au Manitoba, que ce soit pour des postes précis ou des postes de nature plus générale. Les comités permanents de l'Assemblée législative du Manitoba n'ont pas le pouvoir d'examiner les nominations. Très peu de nominations aux conseils sont publiquement annoncées et, même sur les sites Web des conseils, on ne dit pas grand chose des compétences des personnes nommées aux conseils du Manitoba. Souvent, le nom des membres du comité n'est même pas rendu public. Le processus de nomination utilisé au Manitoba manque d'ouverture, de transparence et de mécanismes de responsabilisation et, en l'absence d'exigences claires et publiques sur le processus, de descriptions de travail, de critères de sélection, de processus de sélection impartial et d'annonce publique des nominations, le processus ne peut être, en toute confiance, qualifié d'être fondé sur le mérite.

Le processus de nomination aux conseils fédéraux est devenu plus ouvert grâce à la publication, par le gouvernement fédéral, du *Guide du processus de nominations par décret* et à l'affichage de quelques-uns des postes à doter sur le site Web du gouvernement. Toutefois, le gouvernement ne procède pas à un concours public pour la plupart des nominations à des conseils administratifs, aucune compétence précise n'est énoncée pour les postes, et il n'y a pas de lignes directrices générales sur le processus de nomination qui aient été publiées. Très peu d'information est donnée sur le processus de sélection utilisé pour la plupart des conseils fédéraux. Il est donc difficile d'évaluer si le premier élément pris en compte lors de la nomination est le mérite plutôt que le favoritisme ou la partialité, si les influences partisanes sont réduites au minimum lors de la présélection ou si seuls les noms des candidats les plus qualifiés (par opposition à tous les candidats qualifiés) sont remis au ministre ou au conseil des ministres pour examen. Les mécanismes de responsabilisation se sont améliorés, puisqu'au moins le nom de toutes les personnes nommées est disponible et que le gouvernement semble avoir fréquemment recours à des communiqués de presse pour annoncer les grandes nominations.

Le gouvernement britannique a créé le poste de Commissioner of Public Appointments, une commission indépendante qui se charge de réglementer le processus des nominations publiques, d'enquêter sur les plaintes déposées en rapport avec le processus de nomination, de

surveiller la conformité au *Code of Practice* et de favoriser des procédures de sélection équitables, fondées sur le mérite. Le système britannique est assez extraordinaire, et on y prend des mesures uniques pour s'assurer que le mérite est le seul élément pris en compte pour toutes les nominations publiques.

Dans les ressorts canadiens où des améliorations ont été apportées au processus de nomination à des conseils administratifs, on a procédé par voie de directive d'orientation plutôt que par une réforme législative (à l'exception notable de la Colombie -Britannique). Tous les gouvernements de l'ensemble du Canada qui ont apporté des modifications à leur régime de nomination ont amélioré le caractère ouvert de leur système. Toutefois, dans la plupart des ressorts, il existe encore de nombreuses lacunes à combler en matière de transparence, de responsabilisation et de prise en considération du mérite en tant que facteur déterminant.

J. ÉLÉMENTS DE BONNES POLITIQUES DE NOMINATION

Le fait d'avoir un système ouvert et transparent est essentiel à un processus fondé sur le mérite. Tous les gouvernements de l'ensemble du Canada qui ont apporté des modifications à leur régime de nomination ont, au moins, amélioré le caractère ouvert de leur système. On peut dire qu'un système est « ouvert » si les personnes intéressées à être nommées peuvent facilement trouver les renseignements sur les postes à pourvoir, les compétences nécessaires et la rémunération, quand il y a un appel de candidatures, et si les candidats qualifiés y sont invités à poser leur candidature tout en sachant que leur demande sera examinée de manière équitable (notamment grâce au recours à des initiatives de recrutement appropriées pour la promotion de la diversité au sein des conseils administratifs). À l'ère d'Internet, l'ouverture peut se faire sans que le coût en soit exorbitant. Dans un système transparent, les compétences et la rémunération des membres du conseil administratif sont rendues publiques. On peut aussi s'y renseigner sur le processus décisionnel. Bon nombre des systèmes ayant fait l'objet d'une réforme manquent de transparence. Dans certains ressorts, les compétences affichées sont seulement les compétences minimales prévues par la loi, alors qu'un système transparent devrait diffuser auprès du public les compétences de base souhaitables, ainsi que la rémunération.

La Commission a présenté des recommandations pour que les nominations aux conseils administratifs se fassent de manière ouverte et transparente, notamment en exigeant que tous les processus de nomination soient généralement rendus publics et entrepris de manière équitable, ouverte et transparente, en imposant que tous les postes à pourvoir soient annoncés au moins sur le site Web centralisé du gouvernement et que des renseignements détaillés sur les descriptions de travail, les compétences de base souhaitables, la fourchette de rémunération, ainsi que le processus de sélection, y soient donnés. Il est aussi recommandé qu'une diffusion active soit faite pour obtenir la candidature de personnes membres de collectivités ayant été sous-représentées, à travers l'histoire, dans les conseils administratifs du Manitoba.

Dans un système fondé sur le mérite, il faut que la politique de nomination vise la nomination du candidat le plus qualifié et le respect du mérite comme principe essentiel de la sélection. Les personnes chargées de la sélection devraient décider, à l'avance, quelles sont les compétences de base souhaitables pour les membres du conseil administratif. Il faudrait éliminer, ou au moins, surveiller (selon le type de conseil) l'influence des considérations partisanes dans le

processus de nomination. La Commission a présenté des recommandations pour que les nominations aux conseils administratifs se fassent au mérite, notamment en promulguant une loi exigeant que toutes les nominations à des postes décisionnels et à des postes de réglementation soient fondées sur le mérite, qu'elles tiennent compte de la diversité de la population manitobaine et que des descriptions de travail, des profils des attentes et des descriptions détaillées des compétences de base soient rédigés et affichés sur les sites Web du gouvernement et du tribunal. La Commission a aussi étudié la question des nouveaux mandats donnés à des membres de conseils administratifs déjà en poste et elle recommande que les nouveaux mandats soient accordés en fonction du bon rendement des membres et des besoins du conseil administratif, et que le président joue un rôle clé dans ces évaluations. La Commission reconnaît qu'il peut y avoir des cas où la restriction de la durée du mandat est appropriée, mais elle laisse entendre que cette restriction devrait être traitée dans la loi habilitante de l'organisme ou dans un décret.

En organisant des concours publics, en améliorant la transparence des processus utilisés et en définissant les postes offerts et les compétences de base requises, les gouvernements pourront faire des nominations fondées sur le mérite. Toutefois, pour que les nominations soient dépourvues de favoritisme ou d'allégeance politique, on s'interroge, dans le présent rapport, sur la manière d'apporter des modifications aux structures décisionnelles. Par exemple, si le processus de nomination demeure géré par le personnel politique, sans intervention possible du conseil administratif à l'étape de la présélection et s'il est prévu qu'une liste non ordonnée de tous les candidats qualifiés est remise à l'autorité de nomination, la mise en œuvre d'autres recommandations incluses dans le présent rapport aura un effet minime. La Commission recommande de s'assurer que le premier élément à prendre en compte au moment de toutes les nominations au conseil administratif est le mérite, et non le favoritisme ou la partialité. Pour ce faire, le gouvernement du Manitoba devrait créer un secrétariat central chargé des nominations, qui aurait une fonction de surveillance générale et de surveillance du processus de nomination, en plus d'être hébergé de manière indépendante; élaborer des processus visant à constituer des comités de présélection, chargés d'évaluer le mérite de chaque candidature et incluant au moins, comme membre, le président du conseil; faire en sorte que tous les membres du comité de présélection affirment leur impartialité en ce qui concerne tous les aspects du processus de sélection; exiger que le comité de présélection prépare une liste restreinte ordonnée des candidats les plus qualifiés, liste qui sera remise à l'autorité de nomination; et exiger que les candidats déclarent toute participation récente et importante à des politiques partisanes, renseignements qui seront seulement rendus publics lorsque le nom du candidat retenu sera annoncé.

La Commission constate que la plupart des régimes de nomination canadiens prévoient très peu de mécanismes de responsabilisation, pour ce qui est des nominations individuelles et, de manière plus générale, du fonctionnement du processus de nomination. La Commission recommande que soient surveillés les progrès dans la mise en œuvre et le maintien de la nouvelle politique de nomination. Pour ce faire, le gouvernement du Manitoba devrait publier, sur les sites Web du secrétariat central chargé des nominations et du conseil administratif en cause, le nom des candidats retenus ainsi qu'une brève notice biographique les concernant. La Commission recommande aussi que les conseils administratifs et le secrétariat central chargé des nominations présentent un rapport annuel sur les progrès de la réforme en matière de nomination, notamment sur les améliorations apportées au processus de nomination et sur la diversité accrue de leurs membres.